

Volume 1, 2010

ISSN: 2046-4843

# International Journal on Human Rights and Drug Policy

Official Journal of the International Centre on Human Rights and Drug Policy



International Centre  
on Human Rights  
and Drug Policy

# International Journal on Human Rights and Drug Policy

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International Centre on Human Rights and Drug Policy

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The *International Journal on Human Rights and Drug Policy* is the official journal of the International Centre on Human Rights and Drug Policy, whose academic base is the Irish Centre for Human Rights at the National University of Ireland Galway.

## Subscription Information

The *International Journal on Human Rights and Drug Policy* is published annually. It is an open access journal available free online at [www.humanrightsanddrugs.org](http://www.humanrightsanddrugs.org).

ISSN 2046-4843 (print)

ISSN 2046-4851 (online)

Hard copies may be obtained free of charge from the International Centre on Human Rights and Drug Policy, c/o Irish Centre for Human Rights, National University of Ireland Galway, Galway, Ireland or by contacting [info@humanrightsanddrugs.org](mailto:info@humanrightsanddrugs.org). There may be a postage charge applied for those requesting multiple copies.

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## Thanks

Irish Centre for Human Rights. Prof William A Schabas. Mark Joyce. Bi Yingxi. Nancie Prudhomme. Patrick Gallahue. Thanks also to those who reviewed submissions.

Designed by Mark Joyce.

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## **Contents**

Volume I, 2010

### **Editorial**

'Deliver us from evil'? – The Single Convention on Narcotic  
Drugs, 50 years on

**Rick Lines**

**Page 3**

### **Original Articles**

Targeted Killing of Drug Lords: Traffickers as Members of  
Armed Opposition Groups and/or Direct Participants in  
Hostilities

**Patrick Gallahue**

**Page 15**

*Yong Vui Kong v. Public Prosecutor* and the Mandatory Death  
Penalty for Drug Offences in Singapore: A Dead End for  
Constitutional Challenge?

**Yvonne McDermott**

**Page 35**

### **Interview**

Litigating against the Death Penalty for Drug Offences: An  
interview with Saul Lehrfreund & Parvais Jabbar

**Page 53**

### **Commentaries**

Children who use Drugs: The Need for More Clarity on State  
Obligations in International Law

**Damon Barrett & Philip E Veerman**

**Page 63**

The Function and Relevance of the Commission in Narcotic  
Drugs in the pursuit of Humane Drug Policy (or the  
ramblings of a bewildered diplomat)

**Alison Crocket**

**Page 83**

### **Case Summary**

Canadian Court of Appeal Upholds Supervised Injection  
Site's Right to Operate

**Sandra Ka Hon Chu**

**Page 91**



EDITORIAL

## ‘Deliver us from evil’? – The Single Convention on Narcotic Drugs, 50 years on

Rick Lines\*

*This body of legislation rests (so far as it concerns drug trafficking offences) on a series of important premises: that the unlawful consumption of drugs...is a very grave, far-reaching and destructive social evil; that persistence of this evil depends on the availability of an adequate supply of drugs for consumption;...that the evil consequences of drug trafficking are such as properly to engage the sanctions and procedures of the criminal law.*

Privy Council (Scotland), 2001<sup>1</sup>

*The first evil that we must deal with is that which exists as a consequence of the fact that the whole thing is the wrong way round.*

Aneurin Bevan, MP, 1946<sup>2</sup>

This year marks the 50<sup>th</sup> anniversary of the Single Convention on Narcotics Drugs. Ratified in 1961, the Single Convention was the first of three United Nations treaties enshrining the international community’s approach to drug control.<sup>3</sup>

The original purpose of the Convention was a ‘Transfer to the United Nations of the powers

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<sup>1</sup> *HM Advocate v McIntosh (Robert) (No.1)*, Privy Council (Scotland), 5 February 2001, para. 4.

<sup>2</sup> House of Commons (30 April 1946) HC Deb, vol. 422 c 44.

<sup>3</sup> Single Convention on Narcotic Drugs 1961 (as amended by the 1972 Protocol) (30 March 1961), UNTS vol. 520 no. 7515. [hereinafter ‘Single Convention’]; 1971 Convention on Psychotropic Substances (21 February 1971) UNTS vol. 1019 no. 14956. [hereinafter ‘1971 Convention’]; UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988) UNTS vol. 1582 no. 27627.

exercised by the League of Nations in connexion with Narcotic Drugs',<sup>4</sup> and the task given to the drafters by the UN General Assembly was to bring together the content of the pre-existing international drug control agreements established under the League of Nations into one single international instrument (hence the title, the Single Convention).<sup>5</sup>

In recent years there has been growing attention to the human rights implications of the international narcotics control regime among non-governmental organisations<sup>6</sup> and UN human rights monitors.<sup>7</sup> Human rights violations documented in the name of drug control in countries across the world include: the execution of hundreds of people annually for drug offences;<sup>8</sup> the arbitrary detention of hundreds of thousands of people who use (or are accused of using) illicit drugs;<sup>9</sup> the infliction of torture, or other forms of cruel, inhuman or degrading treatment, in the name of 'drug treatment';<sup>10</sup> the extrajudicial killings of people suspected of being drug users or drug traffickers;<sup>11</sup> and the denial of potentially life saving health services for people who use drugs.<sup>12</sup>

While all of this work is significant, with some notable exception this emerging body of commentary has tended to focus on the documentation specific human rights violations linked to drug enforcement laws, policies and practices, rather than interrogating the drug conventions themselves, and the practices that emerge from their domestic implementation, from the perspective of international human rights law. Yet bringing such a human rights law perspective to the international drug control regime is a crucial exercise, both to promote consideration of international drug control law in the context of overall State obligations under the body of public international law as a whole, but also to further promote human rights-compliant implementation of the international drug conventions at the national level.

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4 ECOSOC Official Records, No. 2, First Year Third Session (12 and 17 September 1946) p. 28.

5 The Single Convention was intended to replace the following agreements: International Opium Convention 23 Jan 1912 and subsequent protocols; Opium Agreement and Protocol and Final 11 Feb 1925; Convention, Protocol and Final Act 19 Feb 1925 and later protocol; Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs 13 July 1931; Opium Agreement and Final Act 27 Nov 1931; Convention for the Suppression of Illicit Traffic in Dangerous Drugs 26 June 1936; Protocol to bring under international control drugs outside the scope of the 1932 convention.

6 See, for example, the work of the Canadian HIV/AIDS Legal Network, Human Rights Watch, International Harm Reduction Association and Open Society Institute, among others.

7 See, for example, UN General Assembly, 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (6 August 2010) UN Doc. No. A/65/255.; Office of the High Commissioner for Human Rights, 'High Commissioner calls for focus on human rights and harm reduction in international drug policy', press release, 10 March 2009.; Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (14 January 2009) UN Doc. No. A/HRC/10/44.

8 Patrick Gallahue and Rick Lines, *Death Penalty for Drug Offences: Global Overview 2010*, International Harm Reduction Association, London, 2010.

9 Human Rights Watch, *Skin on the Cable: The Illegal Arrest, Arbitrary Detention and Torture of People Who Use Drugs in Cambodia*, Human Rights Watch, New York, 2010.; Roxanne Saucier, ed., *Treated with Cruelty: Abuses in the Name of Drug Rehabilitation*, Open Society Foundations, New York, 2011.

10 *ibid.*; Richard Elliott, Rick Lines and Rebecca Schleifer, *Treatment or torture? Applying international human rights standards to drug detention centers*, Open Society Foundations, New York, 2011.

11 Human Rights Watch, *Not Enough Graves: The War on Drugs, HIV/AIDS, and Violations of Human Rights*, Human Rights Watch, New York, June 2004.

12 UN General Assembly (n 8) pp. 16–18.

## Humanitarian or stigmatizing? - The preamble to the Single Convention

The Single Convention's drafting and entry into force predate the modern framework of international human rights treaty law, as enshrined in the eight core United Nations human rights conventions. However, this is not to suggest that the treaty itself, and its implementation by States Parties, does not engage human rights obligations and raise human rights concerns. Indeed, the history of international efforts to control narcotics has from the start been framed as a humanitarian mission, rather than strictly an exercise in law enforcement. However, these humanitarian ideals have far too often been superseded by policies and practices that have the opposite effect, therefore highlighting the conflict between drug control in principle and drug control in practice.

The human rights conflicts at the heart of the Single Convention, and indeed within the international narcotics control regime as a whole, are illustrated within the treaty's preambular section, which begins

*The Parties,*

*Concerned with the health and welfare of mankind,*

*Recognizing that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes,*

Here the preamble engages concepts central to modern discourse on economic, social and cultural rights. Despite the fact that the right to health was not enshrined in international law until the entry into force of the International Covenant on Economic, Social and Cultural Rights (under article 12) in 1976, the concept had been clearly articulated in the Constitution of the World Health Organization, drafted in 1946.<sup>13</sup> The Single Convention's focus on 'the health and welfare of mankind' suggests that the treaty and its provisions are intended to advance, and be considered within, this broader context of the right to the highest attainable standard of health.

The Single Convention's reference to the 'health and welfare of mankind' is not an innovation, but rather is in keeping with the language found in the earlier drug treaties agreed under the auspices of the League of Nations, which had always viewed narcotics

<sup>13</sup> Constitution of the World Health Organization (adopted by the International Health Conference New York 19–22 June 1946, signed on 22 July 1946, entered into force on 7 April 1948), Official Records of the World Health Organization, no. 2, p. 100, preamble.

control as a noble enterprise. The preamble of the International Opium Convention of 1912, the very first international drug control treaty, describes 'the gradual suppression of the abuse of opium, morphine, and cocaine' and their derivatives as being a 'humanitarian endeavour'.<sup>14</sup> The subsequent Convention of 1925 similarly describes international cooperation to control the trade in and use of narcotics as a 'humanitarian effort'.<sup>15</sup> During the early drafting stages of the Single Convention in 1950, the UN Secretary-General specifically suggested that the new treaty highlight these same principles, asking that 'If it is decided that the new single convention should have a preamble it might refer...to the social and humanitarian motivation of international co-operation in the field'.<sup>16</sup>

A particularly extravagant articulation of this humanitarian instinct was expressed by the French delegate to the first session of the Commission on Narcotic Drugs held in Lake Success, New York in 1946.

Confucius, he said had advocated the establishment, under the name of the 'Great Union' of a vast association of peoples who 'would extend the conception of welfare not only to include all nationals, of which each State was inclined to cherish its own, but also all individuals without distinction.' Twenty-five centuries had passed. The 'Great Union' so earnestly desired by Confucius had been brought into being, not at Peking, but at Geneva and later at Lake Success and now its first care had been to fight the scourge of opium which afflicted above all the populations of the Far East. The dream of Confucius had thus become a reality.<sup>17</sup>

Just as this broader concern for humanitarian intervention did not start with the Single Convention, it also did not end there. The preamble to 1971 Convention on Psychotropic Substances, the second of the three UN drug control treaties, reaffirms the concern for the health and welfare of mankind, while also 'Noting with concern the public health and social problems resulting from the abuse of certain psychotropic substances'.<sup>18</sup>

The specific recognition in the Single Convention's preamble of the importance of the 'adequate provision' of medicines, and the need for States to 'ensure the availability of

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<sup>14</sup> International Opium Convention (23 January 1912) LNTS 29, 8 LNTS 187, p. 189, preamble.

<sup>15</sup> International Convention, Adopted by the Second Opium Conference (League of Nations), and Protocol relating thereto. Signed at Geneva, February 19, 1925 [1928] LNTS 231, 81 LNTS 317, p. 321, preamble.

<sup>16</sup> Economic and Social Council of the United Nations, 'Commentary on the Draft Single Convention: Note by the Secretary-General' (March 1950) UN Doc. No. E/CN.7/AC.3/4, p. 8.

<sup>17</sup> 'Report to the Economic and Social Council on the First Session of the Commission on Narcotic Drugs held at Lake Success New York, from 27 November to 13 December 1946' (11 December 1946) UN Doc. No. E/C.S.7/55, p. 14.

<sup>18</sup> 1971 Convention (n 3) preamble.

narcotic drugs' for the purpose of 'the relief of pain and suffering', further engages State obligations vis-à-vis the right to health. For example, the Committee on Economic, Social and Cultural Rights considers that the fulfilment of the right to health involves the provision a number of elements, including access to essential drugs.<sup>19</sup> Indeed, the Committee includes such access among the Core Obligations of States under article 12.<sup>20</sup> The failure of States to provide access to medicines to alleviate pain and suffering has prompted critical comment from the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.<sup>21</sup> Indeed, the recognition by the States Party to the Single Convention of the importance of ensuring access to medicines clearly engages the obligation 'to take positive measures that enable and assist individuals and communities to enjoy the right to health.'<sup>22</sup>

However, whatever the intended appeal to a greater humanitarian mission expressed in the Single Convention's opening lines, such sentiments are immediately undermined, if not contradicted, by those that follow, which describe 'addiction to narcotic drugs' as a form of 'evil'.

*Recognizing that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind,*

*Conscious of their duty to prevent and combat this evil,*

*Considering that effective measures against abuse of narcotic drugs require co-ordinated and universal action,*

In the context of international treaty law, this wording is notable in that the Single Convention is the only United Nations treaty characterising the activity it seeks to regulate, control or prohibit as being 'evil'.

Conor Gearty's discussion of terrorism and human rights provides some useful insight in considering the use of such language. Says Gearty, 'There are many things worryingly wrong about this perspective when viewed through a human rights lens. First, it reintroduces into international affairs the language of evil, when one of the primary achievements of the international legal order has been to remove such tendentious and highly inflammatory

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<sup>19</sup> UN Committee of Economic, Social and Cultural Rights, 'General Comment No. 14: The right to the highest attainable standard of health' (11 August 2000) UN Doc. No. E/C.12/2000, paras. 12(a), 17.

<sup>20</sup> *ibid.*, para. 43(c).

<sup>21</sup> UN Human Rights Council 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (14 January 2009) UN Doc. No. A/HRC/10/44, paras. 68–70.

<sup>22</sup> UN Committee on Economic, Social and Cultural Rights (n 19) para. 37.

absolutist talk from the conduct of nation states.<sup>23</sup>

Gearty continues:

In its clearest and most coherent form, this approach asserts that the danger facing our democracies and our culture of human rights is so great, so evil that we are entitled, indeed morally obliged, to fight back, and that in defending ourselves in this way it may well be that we ourselves have to commit evil acts, to commit harms that run counter to our fundamental principles, but that these actions are nevertheless justified, both as necessary (to save ourselves) and as less evil than what our opponents do.<sup>24</sup>

Gearty's description of the negative human rights consequences of this language within the context of terrorism clearly resonate when examining efforts to control narcotics. However, without taking anything away from Prof Gearty's analysis, it is worth pointing out that in the context of narcotic drugs, the international legal order – rather than 'remov[ing] such tendentious and highly inflammatory absolutist talk' – actually *enshrines* the language of evil with the core international legal instruments.

Gearty is correct, however, in his recognition that the use of such language is highly unusual. Indeed, the unique nature of the use of the language of 'evil' in the Single Convention is particularly glaring when considered alongside that used in other treaties addressing issues that the international community considers abhorrent.

For example, neither slavery,<sup>25</sup> apartheid<sup>26</sup> nor torture<sup>27</sup> are described as being 'evil' in the relevant international conventions that prohibit them. Nuclear war is not described as being 'evil' in the treaty that seeks to limit the proliferation of atomic weapons, despite the recognition in the preamble that 'devastation that would be visited upon all mankind' by such a conflict.<sup>28</sup> The closest one finds to the language contained in the preamble to the Single Convention to describe drugs is that found in international instruments in the context of genocide. For example, in describing the crimes committed during the Second World War, the Universal Declaration of Human Rights uses the term 'barbarous acts',<sup>29</sup>

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23 Conor A. Gearty, 'Terrorism and Human Rights', *European Human Rights Law Review*, 2005, p. 3.

24 *ibid.*, p. 1.

25 Convention to Suppress the Slave Trade and Slavery (25 September 1926) 60 LNTS 253, Registered No. 141.

26 International Convention on the Suppression and Punishment of the Crime of Apartheid (30 November 1973) UNTS vol. 1015, no. 14861, pp. 243–248.

27 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) UNTS vol. 1465, p. 85.

28 Treaty on the Non-Proliferation of Nuclear Weapons (25 May 1970) UNTS vol. 729, no. 10485, 1974, pp. 169–175.

29 Universal Declaration of Human Rights (10 December 1948) 217 A (III). [hereinafter 'UDHR']

while the Genocide Convention uses the term ‘odious scourge’<sup>30</sup>

Interestingly, while the humanitarian instincts in the Single Convention’s preamble have their antecedents in earlier instruments, the menacing characterisation of drugs as ‘evil’ does not find expression in any earlier League of Nations treaty addressing narcotics control. Even the two United Nations protocols on narcotic drugs agreed in the years preceding the ratification of the Single Convention do not employ this type language.<sup>31</sup>

However, this is not to suggest that the conception of drugs as ‘evil’ was absent from the international discourse prior to 1961. On the contrary, as discussed in Susan Speaker’s review of anti-narcotic campaigns from 1920—1940,

During the 1920s and 1930s, newspaper and magazine accounts of the ‘narcotics problem’...consistently used the same stock images and ideas to construct an intensely fearful rhetoric about drugs. Authors routinely described drugs, users, and sellers as ‘evil’ and often implied that there was a sinister conspiracy at work to undermine American society and values through drug addiction.<sup>32</sup>

Even this early anti-drugs language built ‘upon images of drugs and drug addicts already in use’, dating back as early as the 1870s descriptions of opium users. But ‘After about 1918, however, these negative images expanded enormously: drug use was increasing characterized...as a monstrous, immensely powerful, civilization-threatening evil, perhaps the worst menace in all history.’<sup>33</sup>

The use of this language was not only found in the popular media of the time, but also in the medical literature. The respected *British Medical Journal*, for example, published many articles describing drugs, drug use or drug trafficking as being ‘evil’.<sup>34</sup> In 1909, an article in the *American Journal of International Law* described the ‘widespread evil’ of opium smoking.<sup>35</sup>

Moving into the era of the United Nations, the first session of the UN Commission on

30 Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) UN Doc. No. A/RES/260, preamble.

31 Protocol amending the Agreements, Conventions and Protocols on Narcotic Drugs, concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925, 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936 (11 December 1946); Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and use of Opium (23 June 1953).

32 Susan L. Speaker, “‘The Struggle of Mankind against its Deadliest Foe’: Themes of Counter-Subversion in Anti-Narcotics Campaigns, 1920—1940”, *Journal of Social History*, vol. 34, no. 3, spring 2001, 591—610, p. 591.

33 *ibid.*, p. 592.

34 See, for example, ‘The Traffic in Narcotic Drugs’, *The British Medical Journal*, vol. 2, no. 3283, 1 December 1923, p. 1053.; ‘The Opium Evil’, *The British Medical Journal*, vol. 2, no. 3328, 11 October 1924, p. 678.; ‘Control Of Dangerous Drugs’, *The British Medical Journal*, vol. 2, no. 3639, 4 October 1930, pp. 572—573.; ‘The Traffic in Narcotic Drugs’, *The British Medical Journal*, vol. 2, no. 3795, 30 September 1933, p. 618.

35 Hamilton Wright, ‘The International Opium Commission’, *American Journal of International Law*, vol. 3, no. 3, July 1909, 648—673, p. 670.

Narcotic Drugs in 1946 was presented with a resolution of United States Congress that spoke of 'freeing the world of an age-old evil', noting that 'the only effective way to suppress the demoralizing use of opium and its derivatives (heroin, morphine, and so forth) was to control the source of the evil by limiting cultivation of the poppy plant'.<sup>36</sup> The third session of the Commission in 1948 went so far as to agree a resolution to the Economic and Social Council of the United Nations stating 'that narcotic drugs constituted, and may constitute in the future, a powerful instrument of the most hideous crime against mankind' and urging the Council to 'ensure that the use of narcotics as an instrument of committing a crime of this nature be covered by the proposed Convention on the prevention and punishment of genocide'.<sup>37</sup>

In human rights terms, it is significant that the 'evil' activity described in the Single Convention's preamble is not that of the State (as in the case of slavery or nuclear war, for example) or agents acting on behalf of the State (as in the case of torture), but rather the behaviour of individuals, or a condition resulting from individual behaviour. The preamble clearly identifies that it is 'addiction' that constitutes both 'a serious evil' and 'a social and economic danger to mankind'. Yet whatever one's perspective of the cause(s) of 'addiction', it is by definition the individual circumstance of an individual person. A person is 'addicted' to a narcotic; not a system, a law, a policy, a society or a government. The 'evil' and the 'danger' is therefore inextricably linked to the person who is drug dependent, and perhaps by extension to those others involved in the production, transportation and sale of drugs.

At its core, then, it is individuals that are branded as 'evil' by the Single Convention, which certainly has relevance within a human rights context. For example, it is an interesting question whether such stigmatisation of vulnerable individuals and their behaviour is consistent with the Universal Declaration of Human Rights, which states in its preamble that 'the peoples of the United Nations have in the Charter reaffirmed their faith...in the dignity and worth of the human person'.<sup>38</sup> It is difficult to see how defining millions of persons worldwide as being evil is consistent with reaffirming the inherent dignity and worth of humankind. However, the more immediate question is what is the impact of such stigmatising language when is applied to individuals, and individual behaviour, by an international treaty that calls for 'co-ordinated and universal action' of States against this activity? This question is particularly relevant as, fifty years after the ratification of the Single Convention, the conception of drugs as a menace or an evil still pervades the

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36 UN Commission on Narcotic Drugs, 'Limitation of the Production of Raw Materials (Opium and Coca Leaf) used in the manufacture of narcotic drugs: Documents Transmitted by the Government of the United States of America' (26 November 1946) UN Doc. No. E/C.S.7/8, p. 6.

37 UN Commission on Narcotic Drugs, 'Summary Records of the Third Session Lake Success New York, 3-22 May 1948' (16 February 1949) UN Doc. No. E/CN.7/155, p. 161.

38 UDHR (n 29) preamble.

international discourse on narcotics control.

For example, the opening speech by the Executive Director of the UN Office of Drugs and Crime (UNODC) before the 50th session of Commission on Narcotic Drugs in 2007 told delegates, 'Let's recognize it. Evil minds are at work, looking for productivity improvements even in the deadly business of illicit drug making' and warned that 'We face another evil innovation: cannabis supply...influenced by bio-technologies'.<sup>39</sup> During the 52nd session of the Commission in 2009, the delegation of Kazakhstan expressed its 'appreciation' 'for the contribution UNODC has been making into fighting this evil phenomenon'.<sup>40</sup>

This type of language has moved well beyond international narcotics control arenas such as the Commission on Narcotic Drugs, and has indeed become commonplace in national discourses on drugs and drug use. It can even be found in national High Courts, where people typically seek protection from abuses of human rights.

For example, drugs have been characterised as a 'social evil' by the Supreme Court of Singapore.<sup>41</sup> Persons involved in the drug trade have been described as 'engineers of evil' and 'peddlers of death' by the former Chief Justice of the Malaysian Supreme Court.<sup>42</sup> The House of Lords in Great Britain has characterised drug trafficking as a 'notorious social evil'<sup>43</sup> and the Irish High Court has described 'the growing evil associated with drug dealing'.<sup>44</sup> Even the European Court of Human Rights has talked of 'the scourge of drug trafficking'.<sup>45</sup>

In a 2006 speech, the then Chief Justice of the Supreme Court of India stated that 'Drug abuse is a social evil...Just as any virus, use of drugs and drug trafficking knows no bonds or limitations. It spreads all over a country; from nation to nation; to the entire globe infecting every civilized society irrespective of caste, creed, culture and the geographical location'.<sup>46</sup>

The presence of such 'tendentious and highly inflammatory absolutist talk', to use Gearty's phrase, within discourse of both UN bodies and domestic courts is not only worrying, it contributes to an environment in which human rights violations in the name of drug

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39 Antonio Maria Costa, 'Speech by Antonio Maria Costa, Executive Director of UNODC, to the 50th Session of the Commission on Narcotic Drugs, Vienna', 12 March 2007.

40 Zhanat Suleimenov, 'Statement by Mr. Zhanat Suleimenov, Chairman of the Anti-Drugs Control Committee of the Ministry of Internal Affairs of Kazakhstan, at the high-level segment of the Fifty-Second Session of the UN Commission on Narcotic Drugs', 11 March 2009, p. 2.

41 *Ong Ah Chuan v. Public Prosecutor* [1981] AC 648, para 64.

42 Malaysia Chief Justice Azlan Shah, cited in Sidney L. Haring, 'Death, Drugs and Development: Malaysia's Mandatory Death Penalty for Traffickers and the International War on Drugs', *Columbia Journal of Transnational Law*, vol. 29, 1991, p. 380.

43 *R v Lambert (Steven)* [2001] UKHL 37; [2001] 3 WLR 206; [2001] 3 All ER 577, HL. para 156.

44 *Director of Public Prosecutions v Farrell* [2009], IEHC 368, para. 16.

45 *Phillips v United Kingdom* (5 July 2001), Application no 41087/98, para. 52.

46 YK Sabharwal, 'Keynote Address, National Seminar and Training Programme on Narcotic Drugs and Psychotropic Substances', 25 March 2006, New Delhi.

control flourish around the world. Indeed, it can be argued that this rhetoric of 'evil' goes so far as to provide ideological justification for, and defense of, such abuses. As noted by Robin Room, it is this language of drugs as 'evil' that 'serves as a justification of the...Convention regime of control and coercion'.<sup>47</sup>

### **Bridging the parallel universes of human rights and drug control**

The most frequently recited Christian prayer in the world, the one that begins with an address to God as 'Our Father who art in heaven', ends with a petition fraught with meaning: 'Deliver us from evil.' This implies that there is an evil element in human nature from which God can free us, and we pray that he will do so. Human beings, as we know, have sometimes been tempted to take upon themselves this purifying role and we are well aware of the catastrophic results.<sup>48</sup>

In describing the relationship between the international drug control regime and international human rights law, the former UN Special Rapporteur on the right to the highest attainable standard of health, Paul Hunt, noted that the two systems 'behave as though they exist in parallel universes'.<sup>49</sup> In the gap between these parallel universes, human rights violations in the name of drug control go unnoticed, and largely unquestioned. The International Journal on Human Rights and Drug Policy seeks to bridge that gap, and to bring much needed attention to an area of law that has escaped human rights scrutiny.

In his article, 'Targeted Killing of Drug Lords: Traffickers as Members of Armed Opposition Groups and/or Direct Participants in Hostilities', Patrick Gallahue examines US military policy in Afghanistan. He specifically analyses the targeted killing of drug traffickers with links to the Taliban by US forces. Gallahue argues that drug traffickers, even those who support the Taliban, are not legitimate targets according to the rules applicable to non-international armed conflict, and that the US policy violates international humanitarian law.

In '*Yong Vui Kong v. Public Prosecutor* and the Mandatory Death Penalty for Drug Offences in Singapore: A Dead End for Constitutional Challenge?', Yvonne McDermott examines the recent decision of the Singapore Court of Appeal in the case of *Yong Vui Kong*, in which the applicant challenged the constitutionality of the mandatory death penalty for drug offences. McDermott explores the application of the mandatory death penalty through the

47 Robin Room, 'Addiction Concepts and International Control', *The Social History of Alcohol and Drugs*, vol. 20, spring 2006, 276–289, p. 282.

48 Tzvetan Todorov, 'Memory as Remedy for Evil', *Journal of International Criminal Justice*, vol. 7(3), 2009, 447–462, p. 447.

49 Paul Hunt, *Human Rights, Health and Harm Reduction: States' Amnesia and Parallel Universes*, International Harm Reduction Association, London, 2008, p. 9.

lens of both domestic and international law, and describes an environment in which the demonisation of drugs combined with the need of the State to exercise power and control undermine fundamental human rights protections. According to the author, 'It is difficult to avoid the conclusion that the significance of the mandatory death penalty resides not so much in its efficacy as a practical tool in the suppression of drug trafficking, as in its cultural and symbolic resonance.'

Continuing on the topic of the death penalty, in 'Litigating against the Death Penalty for Drug Offences', Saul Lehrfreund and Parvais Jabbar discuss their work mounting legal challenges to the mandatory death penalty in various Commonwealth countries around the world. Lehrfreund and Jabbar are co-founders and joint Executive Directors of The Death Penalty Project, based at Simons Muirhead & Burton solicitors in London, and are leading experts in the area of human rights and the death penalty. Their interview is of value to both human rights scholars as well as legal practitioners.

Much of the rhetoric surrounding drug control is premised on the need to prevent children from drug use. But what of the rights of children who are already using illegal drugs, and what do the relevant human rights and drug conventions have to say about adolescent drug use? These questions are addressed by Damon Barrett and Philip E. Veerman in 'Children who use Drugs: The Need for More Clarity on State Obligations in International Law', in which the authors bring forward recommendations to address current lacuna in the law.

In a personal reflection, Alison Crocket, the former UK representative to the United Kingdom's delegation to the United Nations in Vienna, discusses the efforts to place human rights on the agenda of the UN Commission on Narcotic Drugs. Crocket describes some the systemic obstacles to addressing human rights issues within the context of the UN drug control regime, and offers ideas for future advocacy. Her conclusion that 'part of the work of those campaigning for humane and pragmatic drug policy is not just to advocate for progress, but also to prevent recession' offers a clear and compelling challenge for advocates.

Finally, Sandra Ka Hon Chu summarises the 2010 decision of the British Columbia Court of Appeal in the case of *PHS Community Services Society v. Canada*. In the judgement, the province's highest appellate court rejected an attempt by the federal government to shut down 'Insite', North America's only supervised injecting facility.



ORIGINAL ARTICLE

# Targeted Killing of Drug Lords: Traffickers as Members of Armed Opposition Groups and/or Direct Participants in Hostilities

Patrick Gallahue\*

## ABSTRACT

In 2009, the United States announced that it had placed fifty Afghan drug traffickers with links to the Taliban on a 'kill list.' This controversial proposal essentially weds the counter-narcotics effort with the mission to defeat the Taliban, and challenges a cornerstone of international humanitarian law, the principle of distinction. This article argues that drug traffickers, even those who support the Taliban, are not legitimate targets according to the rules applicable to non-international armed conflict. It explores the notions of membership in armed groups, civilian status and acts that result in the loss of protection, and argues that the US plan violates international humanitarian law.

## Introduction

In the summer of 2009, the US Pentagon announced that it had placed fifty Afghan drug traffickers on a list of people 'to be killed or captured',<sup>1</sup> essentially wedding the mission to defeat the Taliban with the counter-narcotics effort in Afghanistan.<sup>2</sup> One implication of this decision

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<sup>1</sup> *Afghanistan's Narco War: Breaking the Link between Drug Traffickers and Insurgents, A Report to the Committee on Foreign Relations United States Senate*, 10 August 2009, p. 1. [hereinafter referred to as 'Senate Report']

<sup>2</sup> *ibid.*

is that by placing ‘no restrictions on the use of force with these selected targets’,<sup>3</sup> it appears to have given those drug traffickers an equal legal status as insurgents in the eyes of the US military.<sup>4</sup>

While the decision inspired some international discussion,<sup>5</sup> considering its implications it is surprising that it did not arouse more. After all, targeted killing is a contentious proposal even for those who sporadically partake in acts of violence (i.e., attacks) on behalf of an insurgency, much less the criminal associates of those actors. One can only imagine the backlash if a Western government proposed killing every person suspected of donating money to the Taliban, which is in fact what is being proposed, although in this instance it is being limited to those engaged in a certain method of fundraising.

The issue ultimately comes down to determining who is a legitimate target in the war against the Taliban, and the factors leading to such a determination. This article will explore these questions with specific reference to the US policy of targeting Afghan drug traffickers. It will consider the issue of membership in armed groups, civilian status and acts that result in the loss of protection, namely through direct participation in hostilities.<sup>6</sup> Theories on direct participation in hostilities will be explored in the context of the armed conflict in Afghanistan, as well as the relationship between this notion and the drug trade. Finally, the article will examine whether drug traffickers in Afghanistan are engaged in the armed conflict to a degree making them legitimate targets.

The article concludes that the answer to this question is no. Financially supporting an insurgency is not an activity that costs civilians their protected status, thus it cannot justify landing them on a ‘kill list.’<sup>7</sup> Drug trafficking is not synonymous with combat, and therefore coalition troops cannot equate such acts with direct participation.

### **The principle of distinction in non-international armed conflict**

It makes for a counter-intuitive analogy to liken the leaders of the austere Taliban – holed up in desert-hideouts – with the neurotic fictional television Mafiosi, Tony Soprano. Yet that is precisely how Afghanistan’s insurgency was described to an American congressional

3 *ibid.*, p. 15.

4 James Risen, ‘U.S. to Hunt Down Afghan Drug Lords Tied to Taliban’, *The New York Times*, 9 August 2009. The New York Times, which broke the story, wrote that the proposal, ‘means [traffickers] have been given the same target status as insurgent leaders, and can be captured or killed at any time.’

5 Dapo Akande, ‘US/NATO Targeting of Afghan Drug Traffickers: An Illegal and Dangerous Precedent?’, *EJIL: Talk*, 13 September 2009, <http://www.ejiltalk.org/usnato-targeting-of-afghan-drug-traffickers-an-illegal-and-dangerous-precedent> (accessed 14 April 2010).; Christopher M. Blanchard, *Congressional Research Service, Afghanistan: Narcotics and U.S. Policy*, 12 August 2009, p. 16.

6 This essay uses the term direct and active participation in hostilities interchangeably.

7 *Senate Report* (n 1) p. 15.

committee when journalist Gretchen Peters, an authority on the relationship between the insurgency and the drug trade, told Senate staff, “The Sopranos are the real model for the Taliban. They are driven by economic factors.”<sup>8</sup>

In the Senate report that emerged from these hearings, the Taliban was described as a fractured assortment of armed forces rather than as an organised ‘monolith’.<sup>9</sup> As such, their range of activities vary from the combat-oriented to the strictly criminal, potentially causing confusion between which deeds are acts of greed and which are acts of war, and muddling an already complex conflict.

The current situation in Afghanistan is usually classified as a civil war, also known as internal or non-international armed conflict, between the Taliban and the Afghan state.<sup>10</sup> Since Afghan President Hamid Karzai took power in 2002, the US military’s role has been to support the government’s effort to defeat the Taliban insurgency with the agreement of the Afghan state.<sup>11</sup>

Afghanistan is clearly not the traditional battlefield nor is the conflict’s insurgent party a uniformed army marching towards the frontlines. However, this hardly makes the situation unique. In most civil wars, government armed forces are compelled to confront guerrillas who rarely distinguish themselves from the civilian population. Furthermore, it is commonplace for rebels to rely on illegal activities to fund their operations.

The laws of war<sup>12</sup> have always aimed to distinguish combatants from civilians in order to protect the latter from the consequences of combat.<sup>13</sup> This tenet, known as the principle of distinction, is a cornerstone of international humanitarian law.<sup>14</sup> The most basic rules governing internal armed conflict are found in Article 3 common to the Four Geneva Conventions of 1949 (also known as common Article 3).<sup>15</sup> According to the International Court of Justice, its rules reflect ‘elementary considerations of humanity’ applicable to

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8 *ibid.*, p. 9.

9 *ibid.*

10 *GS (Existence of Internal Armed Conflict) Afghanistan v. Secretary of State for the Home Department*, CG [2009] UKAIT 00010, United Kingdom: Asylum and Immigration Tribunal/Immigration Appellate Authority, 23 February 2009.

11 Afghanistan Independent Human Rights Commission, *From Hope to Fear: An Afghan Perspective on Operations of Pro-Government Forces in Afghanistan*, December 2008, p. 7.; Human Rights Watch, “*Enduring Freedom*” *Abuses by U.S. Forces in Afghanistan*, vol. 16, no. 3(C), March 2004, pp. 47–48.

12 The terms ‘laws of war’ and international humanitarian law are used interchangeably in this article.

13 Antonio Cassese, *International Law*, 2<sup>nd</sup> edn, Oxford University Press, UK, 2005, p. 400.

14 Frits Kalshoven & Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, International Committee of the Red Cross, 2001, pp. 14, 138.

15 Geneva Convention of August 12, 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (1950) 75 UNTS 31, Article 3; Geneva Convention of August 12, 1949 for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, (1950) 75 UNTS 85, Article 3; Geneva Convention of August 12, 1949 Relative to the Treatment of Prisoners of War, (1950) 75 UNTS 135, Article 3; Geneva Convention of August 12, 1949 Relative to the Protection of Civilians, (1950) 75 UNTS 287, Article 3.

any situation reaching the threshold of armed conflict.<sup>16</sup> The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (known as Additional Protocol II) is also applicable to internal armed conflict, and includes more detailed stipulations on the distinction between civilians and combatants, specifically under Article 13.<sup>17</sup> The United States has signed but not acceded to the treaty,<sup>18</sup> while Afghanistan acceded to the Protocol in the summer of 2009.<sup>19</sup> Nevertheless, both states are bound by the rules envisaged by the Protocol. The principle of distinction, as formulated under the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) has reached the status of customary law applicable to both international and non-international armed conflicts.<sup>20</sup> Article 51(2) makes clear that, ‘The civilian population as such, as well as individual civilians, shall not be the object of attack.’<sup>21</sup>

However, the rules for internal armed conflict leave many subjects unclear, including those of individual status and who is meant to receive protection.<sup>22</sup> For example, when armed groups operate in secret, how are the ‘members’ of that group supposed to be distinguished from the civilian population? The question of how widely one can interpret ‘membership’ in an armed group could be centred on the combatant/civilian distinction. However, the law is unfortunately vague when it comes to differentiating ‘civilians’ and ‘members’ (i.e., combatants<sup>23</sup>) of a party to the armed conflict in civil war. Neither term – combatant nor civilian – has much clarity in the rules governing internal armed conflict.<sup>24</sup> Common Article 3 only asserts that, ‘Persons taking no active part in the hostilities ... be treated humanely.’<sup>25</sup> However, exactly what this means, or how to define those not taking part in hostilities, was never thoroughly discussed during the drafting of common Article 3.<sup>26</sup>

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16 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*; *Merits*, International Court of Justice, 27 June 1986, p. 114.; Cassese (n 13) p. 431.

17 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 Jun 1977) 1125 UNTS 609.

18 International Committee of the Red Cross, ‘International Humanitarian Law - Treaties & Documents’, 2010, <http://www.icrc.org/ihl> (accessed 15 April 2010).

19 International Committee of the Red Cross, ‘Afghanistan accedes to Additional Protocols I and II in historic step to limit wartime suffering’, news release, 24 June 2009.

20 *Prosecutor v. Struger (judgment) IT-01-42-T*, Trial Chamber II, 31 January 2005, para. 220.; Louise Doswald-Beck & Jean-Marie Henckaerts, *Customary International Humanitarian Law: Rules Vol. 1*, Cambridge University Press, UK, 2005.; Jean-Marie Henckaerts, ‘Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict’, 857 *International Review of the Red Cross* 175, 2005, p. 189.

21 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3.

22 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, International Committee of the Red Cross, May 2009, p. 27. [hereinafter referred to as ‘ICRC Final Interpretive Guidance’]

23 Though it has been written, ‘Combatants in the strictly legal sense are members of the *regular armed forces of states*.’ Toni Pfanner, ‘Editorial – ICRC December 2008’, 872 *The International Review of the Red Cross* 819, 2008.

24 Michael Bothe, *International Committee of the Red Cross, Second Expert Meeting on the Notion of Direct Participation in Hostilities in Non-International Armed Conflict*, The Hague, 25–26 October 2004, p. 4.

25 Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, Geneva Convention III, Third Geneva Convention.

26 Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, UK, 2002, p. 58.

The laws of international armed conflict provide definitions for the terms ‘civilian’ and ‘armed forces’ under Additional Protocol I, applicable to international armed conflict.<sup>27</sup> However, ‘[t]he distinction between the first and the second category ... is a negative one: all persons who are not combatants are civilians.’<sup>28</sup> Yet the term ‘combatant’ is not found under common Article 3.<sup>29</sup> Rather, it uses the term ‘members of armed forces’, but even then only in reference to *hors de combat*.<sup>30</sup> How then to determine how to differentiate between civilians and armed groups or, for that matter, whether to differentiate them?<sup>31</sup> There has never been a clear opinion over whether or not ‘members’ of non-state armed opposition groups, such as the Taliban, should be considered civilians.<sup>32</sup>

### Membership in armed groups in internal armed conflict

There are precious few sources that offer substantive and definitive guidance on the principle of distinction in non-international armed conflict. Article 13(1) of Additional Protocol II states that civilians must be protected ‘against the dangers arising from military operations’, but adds in paragraph three that the protection exists ‘unless and for such time as they take a direct part in hostilities.’<sup>33</sup> This clearly means that the loss of protection is temporary and hinges on conduct.<sup>34</sup> However, the Commentary on the Additional Protocol states that, ‘Those who belong to armed forces or armed groups may be attacked at any time’,<sup>35</sup> which establishes a group of people who take part in hostilities ‘in an organised form [who] may always be the object of attacks.’<sup>36</sup>

The International Criminal Tribunal for the former Yugoslavia also made reference to the status of an ‘individual who cannot be considered a traditional “non-combatant” because he is actively involved in the conduct of hostilities by membership in some form of resistance group.’<sup>37</sup> Some authorities refer to this category as ‘fighter’, a word that ‘does not appear in any binding treaty.’<sup>38</sup> However, it seems that this category of ‘fighter’ is understood to be a permanent status, defined as ‘members of armed forces and dissident armed forces

27 Additional Protocol I (n 21) arts. 43(1), 50(1).

28 Bothe (n 24) p. 3.

29 The ICRC group of experts notes in its final report (n 22) that ‘Common Article 3 GC I-IV generally is not considered to govern the conduct of hostilities, its wording allows certain conclusions to be drawn with regard to the generic distinction between the armed forces and the civilian population.’

30 Bothe (n 24) p. 4.

31 Nils Melzer, *Background Document Working Sessions IV and V, Direct Participation in Hostilities and Membership in Organized Armed Groups*, International Committee of the Red Cross, 23–25 Oct 2005, p. 3. [hereinafter referred to as ‘ICRC Background Document’]

32 *ibid.*; Moir (n 26) p. 58.

33 *Additional Protocol II* (n 17).

34 Bothe (n 24) p. 9.

35 International Committee of the Red Cross, *Commentary Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, para. 4789.

36 Bothe (n 24) p. 9.

37 *Prosecutor v. Duško Tadić (Judgement)* [‘*Tadić Trial Chamber Judgment*’] IT-94-I-T, Trial Chamber, 7 May 1997, para 639.; Bothe (n 24) p. 15.

38 International Institute for Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict with Commentary*, San Remo, 2006, p. 4

or other organized armed groups, or [those] taking an active (direct) part in hostilities’<sup>39</sup> Consequently, anyone trying to understand who can be lawfully targeted in an internal armed conflict must wrestle with competing notions of ‘membership’<sup>40</sup> in an armed group versus a strictly ‘conduct-based approach’.<sup>41</sup> While under the former a person may be subject to attack at any time simply by virtue of membership in a resistance group, under the latter the person is only considered a legitimate target during those specific periods of time when he or she is actually involved in the fighting.

### **Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law**

The ambiguity between the article and the Commentary has recently received a much-needed clarification by the International Committee of the Red Cross (ICRC), in consultation with a panel of renowned legal experts. The Interpretive Guidance provided by the ICRC is not a legally binding instrument, but is intended to be a good-faith interpretive tool for an extremely complex topic.<sup>42</sup> Furthermore, it is not intended to be a remaking of the law but rather an analysis within the existing legal framework.<sup>43</sup> The experts spent several years discussing the meaning of direct participation in hostilities and produced multiple reports on the status of their deliberations.

An early focus of their discussions was the definition of ‘civilian’. One fairly straightforward view is that civilians are people ‘who are neither members of state armed forces nor of organised armed groups and who do not otherwise participate in hostilities.’<sup>44</sup> A potential implication of this is that a person who is, and remains, actively involved with an armed group could be said to have become a ‘member’ of that armed group, and in so doing loses their civilian status.<sup>45</sup> The Commission of Experts debated this as ‘the membership approach’. Supporters of ‘the membership approach’ argued that the act of joining a group that carried out sustained attacks against its enemy ought to be considered a form of direct participation.<sup>46</sup> After all, it is not implausible to presume that a person joining an insurgent group will likely commit acts of violence.

In order to distinguish the military faction of a non-state party to an armed conflict from

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39 *ibid.*

40 Nils Melzer, *Third Expert Meeting on the Notion of Direct Participation in Hostilities Summary Report*, 23–25 Oct 2005 International Committee of the Red Cross and TMC Asser Institute, 2005, p. 48. [hereinafter referred to as ‘Third Expert Meeting’]

41 *ibid.*, pp. 41–51.; *ICRC Final Interpretive Guidance* (n 22) p. 28.

42 *ICRC Final Interpretive Guidance* (n 22) p. 10.

43 *ibid.*

44 *ICRC Background Document* (n 31) p. 8.

45 *ibid.*

46 *Third Expert Meeting* (n 40) p. 48.

its civilian support component, some experts devised a notion dubbed ‘continuous combat function’.<sup>47</sup> These ‘functional’ ‘armed forces’ of the non-state party lose protection from direct attack for as long as their combat function in the group lasts.<sup>48</sup> This membership is meant to describe circumstances when ‘individuals go beyond spontaneous, sporadic, or unorganized direct participation in hostilities and become members of an organized armed group belonging to a party to the conflict’.<sup>49</sup> Once this is established, these individuals lose civilian status and its associated protection, according to the ICRC.<sup>50</sup> Among the relevant determining factors in this situation are that a person has been ‘recruited, trained and equipped’ by the armed group to hold an ongoing combat function.<sup>51</sup>

In applying this definition to the question of drug traffickers, it is possible that the United States could argue that a trafficker’s ‘nexus’ to the Taliban makes that person a ‘member’ of the organisation, and hence a legitimate target. However, evidence or criteria of such a nexus has not been made clear.<sup>52</sup> The Senate report indicates the Taliban’s relationship to the drug trade includes charging farmers a ten percent tax, protection fees for labs, imposing a tariff on traffickers to collect and transport opium paste, fighters moonlighting as poppy farmers to earn extra money and those who simply make regular payments to the Taliban’s central governing body in Pakistan.<sup>53</sup>

Most of these activities would make the Taliban’s relationship to the drug trade predatory, and none could reasonably be considered a combat function. The ICRC’s Interpretive Guidance explicitly states that ‘recruiters, trainers, *financiers* and propagandists’ cannot be said to have combat roles ‘unless their function additionally includes activities amounting to direct participation in hostilities’<sup>54</sup> (emphasis added). In other words, unless they have a job that entails direct participation in hostilities, the parameters of which will be examined below, they cannot be considered a ‘member’ of the armed group.

Yet despite this guidance from the ICRC, the killing of financiers of the Taliban is precisely what is being proposed in the US policy in Afghanistan. As the Senate report states specifically, ‘No longer are U.S. commanders arguing that going after the drug lords is not part of their mandate. In a dramatic illustration of the new policy, major drug traffickers who help *finance* the insurgency are likely to find themselves in the crosshairs of the

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47 ICRC *Final Interpretive Guidance* (n 22) pp. 33, 70.

48 *ibid.*

49 *ibid.*, p 72.

50 *ibid.*

51 *ibid.*, p. 34.

52 Blanchard (n 5) p. 16.

53 *Senate Report* (n 1) p. 9.

54 ICRC *Final Interpretive Guidance* (n 22) p. 34.

military'<sup>55</sup> (emphasis added).

Besides simply receiving or extorting money from the drug trade,, the United Nations Office on Drugs and Crime (UNODC) suggests that the Taliban is also assuming the functions of traffickers directly. Warning of the 'birth of Afghan narco-cartels', the UNODC writes, 'After years of collusion with criminal gangs and corrupt officials, some insurgents are now opportunistically moving up the value chain: not just taxing supply, but getting involved in producing, processing, stocking and exporting drugs.'<sup>56</sup> However, none of these acts are synonymous with combat either.

This is not to say that the nexus between trafficker and Taliban never reaches hostilities. Peters outlines a number of ways the Taliban and drug traffickers collaborate on the battlefield. For example, she has written of armed Taliban fighters accompanying drug consignments to ensure protection.<sup>57</sup> Other examples she cites include instances of insurgents striking at checkpoints to open up routes for traffickers, as well as initiating attacks as a diversion for shipments.<sup>58</sup> However, in most of these particular instances, it is the attackers' violent conduct that makes them legitimate targets, whether they identify themselves as traffickers or Taliban.

While distinguishing between traffickers and Taliban may be challenging, the fact remains that the former are criminal suspects. Should they employ violence to resist search and seizure, coalition troops would be perfectly within the law to employ lethal force. But if there is any uncertainty on the part of coalition troops about how to classify the target, the individual must receive the benefit of the doubt, and be considered protected.<sup>59</sup> Therefore, if the person is entitled to the presumption of civilian status, targeting him or her for assassination when not actively participating in hostilities is a violation of international humanitarian law. This analysis may be what prompted the then UNODC Executive Director, Antonio Maria Costa to caution, 'Major traffickers should be reported to the Security Council and brought to justice – not executed in violation of international law or pardoned for political expediency.'<sup>60</sup>

If there is a distinction between the traffickers who are financing the insurgency and the Taliban-cum-trafficker, the United States seems to be indifferent or unaware. An unnamed

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55 *Senate Report* (n 1) p. 1.

56 United Nations Office on Drugs and Crime, *Afghanistan Opium Survey 2009 Summary Findings*, September 2009, commentary by the executive director.

57 Gretchen Peters, *Seeds of Terror: How Heroin is Bankrolling the Taliban and al Qaeda*, Oneworld Publications, UK, 2009, p. 116.

58 *ibid.*

59 *ICRC Commentary, Additional Protocol II* (n 35) para. 4789.; *ICRC Final Interpretive Guidance* (n 22) p. 71.

60 *ibid.*

military officer told the Senate committee, ‘Our long-term approach is to identify the regional drug figures and corrupt government officials and persuade them to choose legitimacy or remove them from the battlefield’,<sup>61</sup> a statement that raises the question of what constitutes a ‘battlefield’?. On this matter, the Senate report is alarmingly vague. It states that two generals asserted that,

[T]he [Rules of Engagement] and the internationally recognised Law of War have been interpreted to allow them to put drug traffickers with proven links to the insurgency on a kill list, called the joint integrated prioritized target list. The military places no restrictions on the use of force with these selected targets, which means they can be killed or captured on the battlefield; it does not, however, authorize targeted assassinations away from the battlefield.<sup>62</sup>

This statement seems to concede that killing someone outside of a combat situation could be legally dubious, yet there is no indication how broadly the term ‘battlefield’ is being interpreted. Could it be interpreted to mean the entire Afghan territory?

This is not to say that civilians may never be lawfully targeted. In some circumstances, civilians may also be lawfully targeted based on their conduct.<sup>63</sup> As stated in Additional Protocol II, if civilians are actively engaged in hostilities they lose their protection for as long as that participation lasts.<sup>64</sup> This is the separate but related notion of direct participation in hostilities.

### **Direct participation in hostilities**

In its final draft on the Interpretive Guidance on the Notion of Direct Participation in Hostilities, the ICRC wrote, ‘The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.’<sup>65</sup> Although the term ‘hostilities’ is sometimes mistakenly used in lieu of ‘armed conflict’, it should be understood more narrowly to mean ‘offensive or defensive acts and military operations’ in an armed conflict.<sup>66</sup> The acts that constitute hostilities have nothing to do with ‘membership’ and everything to do with conduct.<sup>67</sup> This topic spurred

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61 *Senate Report* (n 1) p. 15.

62 *ibid.*

63 *Third Expert Meeting* (n 40) p. 49–50.

64 *ICRC Final Interpretive Guidance* (n 22) p. 70.

65 *ibid.*, p. 43.

66 Program on Humanitarian Policy and Conflict Research at Harvard University, *Direct Participation in Hostilities under International Humanitarian Law* (Working Paper by J. Quéguiner), November 2003.

67 *ICRC Final Interpretive Guidance* (n 22) p. 44.

lengthy discussions among the experts during the drafting of the Interpretive Guidance. A lively point of contention was how to interpret ‘hostilities’ in a way that honoured the principle of distinction, yet also covered the range of activities that might benefit one of the parties.<sup>68</sup>

In the final document, the ICRC laid out three cumulative conditions that must be met for an act to be direct participation in hostilities.<sup>69</sup> The first criterion is the ‘threshold of harm’, meaning the impact on military operations/capacity of a party to the armed conflict ‘or, alternately, to inflict death, injury, destruction on persons or objects protected against direct attack.’<sup>70</sup> The second is the ‘direct causation’ or ‘direct causal link between the act and the harm likely to result either from the act, or from a coordinated military operation of which that act constitutes an integral part.’<sup>71</sup> Lastly, there must be a ‘belligerent nexus’ which is to say the act must be performed in support of one party over another.<sup>72</sup>

### *Threshold of Harm*

The term ‘threshold of harm’ refers to the harm that an act may cause to military operations of a party to the conflict or to protected categories such as civilians.<sup>73</sup> For acts that are specifically directed at the military, they need not cause the death and destruction of soldiers to be direct participation in hostilities.<sup>74</sup> Disrupting communications, sabotaging equipment and guarding captured personnel may reach the threshold.<sup>75</sup> The ability to impair the enemy is clearly not limited to acts of armed aggression or, as the experts described it, ‘traditional war fighting scenarios.’<sup>76</sup> At the same time, this does not mean that every action with a beneficial result for one party makes the actor an enemy of that armed group’s rival.<sup>77</sup> For instance, providing food and clothing to fighters is decidedly not direct participation.<sup>78</sup> The Inter-American Commission on Human Rights wrote of this distinction

[I]ndirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to

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68 *Third Expert Meeting* (n 40) pp. 17–20.

69 *ICRC Final Interpretive Guidance* (n 22) p. 46.

70 *ibid.*

71 *ibid.*

72 *ibid.*

73 *ICRC Final Interpretive Guidance* (n 22) p. 47.

74 *ibid.*, p. 49.

75 *ibid.*

76 *Third Expert Meeting* (n 40) p. 14.

77 *ICRC Final Interpretive Guidance* (n 22) p. 45.

78 *ibid.*, pp. 11–12.

the adverse party.<sup>79</sup>

Outside of harm directed at the military, the threshold can also be reached by committing acts that are ‘likely to inflict death, injury or destruction’ on civilians or civilian objects.<sup>80</sup> This should be taken to mean targeted assaults on civilians or civilian objects, such as the kind of shelling of villages or sniper attacks that occurred in the former Yugoslavia.<sup>81</sup>

It is usually understood that the manifestation of harm is not necessary to meet the threshold, but rather the potential to cause harm or the ‘objective likelihood that the act will result in such harm’.<sup>82</sup> It would require an absurdly broad reading of the threshold of harm to conclude that trafficking in narcotics presents such a threat to a rival party to the conflict that it makes the trafficker a legitimate target. The drug trade’s harm is not specifically military, and though the civilian population may suffer as a result of illegal narcotics, the production, sale and transport of illicit drugs hardly qualifies as an attack.

Harm is not the same as inconvenience, and there are numerous examples of behaviour that may bother the state and even encourage its rival without amounting to direct participation in hostilities. Afghan citizens who voice support for the Taliban may in some circumstances be breaking domestic laws, but such behaviour does not place them on the ‘battlefield’ or make them legitimate targets for armed attack. If supporting the enemy makes one a legitimate target, why limit the definition of such aid to finance? It could be argued that ideological support plays a role in mobilising opposition to US forces in Afghanistan. Would the US military argue for the targeting of those who spray-paint anti-American graffiti, for example?

### *Direct Causation*

‘Direct causation’ refers to the link between the act, or the operation that the act is part of, and the harm it would likely cause.<sup>83</sup> It is a term articulated in the commentary on Additional Protocol I, which reads, ‘Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.’<sup>84</sup>

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79 Inter-American Commission on Human Rights, *Third Report on Human Rights in Colombia*, 1999, Chap 4A, para. 56.

80 *ICRC Final Interpretive Guidance* (n 22) pp. 49–50.

81 *ibid.*, p. 50.

82 *ibid.*, p. 47.

83 *ibid.*, p. 51.

84 International Committee of the Red Cross, *Commentary, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, para. 1679.

This requirement separates direct from indirect participation in hostilities.<sup>85</sup> Direct participation must be distinguished from taking part in the ‘war effort’, which entails a wide range of activities from working in a munitions factory to preparing food for soldiers, and hence a broader array of potential victims who are not active participants.<sup>86</sup> The commentary on Additional Protocol II states that direct participation means ‘acts of war that by their nature or purpose struck at the personnel and “matériel” of enemy armed forces.’<sup>87</sup> However, this raises a related issue that lacks clarification in the commentary, namely the ‘causal proximity’ between the harm and the act. How far removed from the harm must an act be for it to qualify as direct participation?<sup>88</sup> A problem that the experts encountered in this regard was that “‘hostilities’ did not necessarily have to “harm” the enemy.’<sup>89</sup> Intelligence gatherers, minesweepers and truck drivers, could each qualify as directly participating in hostilities in some circumstances.<sup>90</sup>

It is difficult to consider direct participation in hostilities without considering a broad array of acts, in part because participation is relative to the parties’ operations and conduct.<sup>91</sup> For instance, remote-controlled devices could involve people who are nowhere near the battlefield, and thus understanding who among them is directly responsible for the harm the operation causes is a difficult task.<sup>92</sup> The ICRC’s final analysis states that, ‘where a specific act does not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm.’<sup>93</sup>

Under this analysis, are drug traffickers an ‘integral part’ of an operation that reaches the threshold of harm? It is clear the Taliban would be greatly weakened financially without proceeds from the drug trade, but the final ICRC Guidance separate the act from the harm by ‘one causal step’.<sup>94</sup> For example, a person planting a landmine may be divorced from the harm temporally, but not causally, and is therefore participating in hostilities. Although the poppy fields of Afghanistan provide significant funding for the insurgency,<sup>95</sup> the distance between trafficking in heroin and the harm caused by the Taliban’s military activities is well beyond ‘one causal step’. During deliberations, the experts explicitly stated that if direct participation in hostilities were broadened to include acts related to the enemy’s financial

85 *ICRC Final Interpretive Guidance* (n 22) p. 51.

86 *ICRC Commentary to Additional Protocol I* (n 84) para. 1670.

87 *ICRC Commentary to Additional Protocol II* (n 35) para. 4788.

88 *Third Expert Meeting* (n 40) p. 28.

89 *ibid.*, p. 29.

90 *ibid.*, pp. 29–32.

91 *ICRC Final Interpretive Guidance* (n 22) p. 56.

92 *ibid.*, p. 54.

93 *ibid.*, p. 56.

94 *ibid.*, p. 58.

95 Dexter Filkins, ‘Poppies a Target in Fight Against Taliban’, *The New York Times*, 29 April 2009.

assets, it ‘would amount to opening a Pandora’s box.’<sup>96</sup> If such a definition were to be accepted, the New York Stock Exchange could be considered to be directly participating in hostilities on the US side.

### *Belligerent Nexus*

The final requirement the ICRC identified for an act to be considered direct participation in hostilities is ‘belligerent nexus’. This pertains to the benefit an act is intended to provide for one party to the conflict over another. As the ICRC wrote, ‘an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict to the detriment of another’.<sup>97</sup>

There may be evidence that some traffickers are providing financing exclusively to the Taliban with the intent of helping the insurgency defeat the Karzai government. In this circumstance, there may actually be a belligerent nexus. However, absent the other two conditions above, it simply is not enough to make that trafficker a legitimate target. There is also another problem. The establishment of belligerent nexus must be set apart from subjective, or even hostile, intent.<sup>98</sup> Its determination must rely on objective criteria.<sup>99</sup> The Final Guidance states, ‘belligerent nexus relates to the objective purpose of the act. That purpose is expressed in the design of the act or operation and does not depend on the mindset of every participating individual’.<sup>100</sup>

Therefore, even though the ‘design of the act or operation’ of drug trafficking tends to be profit, it is irrelevant to the decision to target. The experts almost unanimously agreed that it would be impossible to ascertain subjective motives in the heat of battle.<sup>101</sup> Belligerent nexus cannot be equated with ‘subjective intent and hostile intent’.<sup>102</sup> In most circumstances, it does not matter whether the actor *intends* to harm coalition forces or their goals, but rather whether the act in some objective sense is meant to support the Taliban. A pickpocket may support the Taliban whole-heartedly but, on the face of the act, it is difficult to see how snatching billfolds is performed in the service of the enemy. Therefore it would be blatantly unlawful to target the pickpocket under the pretence of direct participation in hostilities.

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96 *Third Expert Meeting* (n 40) p. 15.

97 *ICRC Final Interpretive Guidance* (n 22) p. 46.

98 Michael N. Schmitt, ‘Direct Participation in Hostilities and 21st Century Armed Conflict’ in *Crisis Management and Humanitarian Protection*, ed. H Fischerr, et al, BWV, Berlin, 2004.

99 *ICRC Final Interpretive Guidance* (n 22) p. 59.

100 *ibid.*

101 *ibid.*

102 *ibid.*

### Common article 3

Under common Article 3, those not taking direct part in hostilities must ‘be treated humanely’, which includes a prohibition on ‘violence to life and person.’<sup>103</sup> This prohibition is on directly targeting civilians. If in the course of attacks on the Taliban civilians are killed, be they law abiding or drug trafficking, it could be measured as collateral damage and would not necessarily be a violation of international humanitarian law, as long as the principles of proportionality were respected.<sup>104</sup> But at the same time, these civilians, even if they are criminals, may not be targeted for attack (unless of course they take direct part in hostilities).<sup>105</sup>

Furthermore, Common Article 3 expressly forbids ‘the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.’<sup>106</sup> While the Senate report never identified the people the US military intends to target, it would seem unlikely that the drug traffickers have been given the opportunity to challenge the evidence that resulted in their being placed on the list. Moreover, as the International Court of Justice declared in its decision on the *Legality of the Threat or Use of Nuclear Weapons*, international human rights norms do not cease in times of armed conflict.<sup>107</sup> Therefore, targeted killing of suspected drug traffickers in an environment where (as the US military admits) it is difficult to establish reliable evidence<sup>108</sup> creates a landslide of human rights concerns, among them, potential violations of the right to life. As the Inter-American Commission on Human Rights stated,

[T]he contours of the right to life may change in the context of an armed conflict, but the prohibition on arbitrary deprivation of life remains absolute. The Convention clearly establishes that the right to life may not be suspended under any circumstances, including armed conflicts and legitimate states of emergency.<sup>109</sup>

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103 International Institute for Humanitarian Law (n 38) p. 23.

104 *ibid.*

105 *ibid.*; Akande (n 5).

106 Article 3(i)(d) Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, Geneva Convention III, Third Geneva Convention.

107 ‘The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion’, *ICJ Report* 2, 8 July 1996, p 240, para. 25.

108 *Senate Report* (n 1) pp. 14–15. The report said generals have said that in order to be placed on the list, it ‘require[s] two verifiable human sources and substantial additional evidence’.

109 Inter-American Commission on Human Rights, *Third Report on Colombia*, Doc. No. OEA/Ser.L/V/II.102, 26 February 1999, chap. IV, para. 18.

## Targeted killing and the ‘war on terror’

Targeted killings<sup>110</sup> were debated at length when the United States and Israel began assassinating their enemies in their respective wars on terror. In 2002, the US Central Intelligence Agency assassinated al-Qaeda operative Qaed Salim Sinan al Harethi in Yemen using an unmanned Predator drone.<sup>111</sup> Sweden’s then foreign minister, Anna Lindh, made an argument that seemed to foretell the current predicament when she stated that ‘Even terrorists must be treated according to international law. Otherwise, any country can start executing those whom they consider terrorists.’<sup>112</sup>

Targeted killings have continued under the new US administration, with fresh strikes in Pakistan occurring just a few days into the Obama presidency.<sup>113</sup> Exactly how the US justifies these acts is difficult to determine, because its evidence and legal reasoning have been kept from public view.<sup>114</sup> Interestingly, while the CIA was hunting al-Harethi, the State Department was vocally criticising Israel’s ‘policy of targeted frustration’ of terrorism,<sup>115</sup> which allowed ‘security forces [to] act in order to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel’<sup>116</sup>—in other words, targeted killings.

Scholars, policymakers, activists and human rights advocates hotly debated the legitimacy of these acts. Analysing the situation through the lens of international humanitarian law, Amnesty International roundly criticised Israel (and later the United States) for its use of targeted assassinations.<sup>117</sup> Some advocates warned of the potential danger that ‘literalizing’ the war on terror could have on peacetime protections.<sup>118</sup> Many scholars, however, also noted that it was the aforementioned gaps in the law that made it such a difficult issue.<sup>119</sup> In fact, the importance of the ICRC Guidance was commonly emphasised by authorities wrestling with the matter, because it was precisely these types of questions related to

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110 It has been noted elsewhere that targeted killing is lacking a precise definition in international law. For the purposes of this paper, it will use the meaning as given by Anderson, ‘the intentional, direct targeting of a person with lethal force intended to cause his death’. It is also used interchangeably with targeted assassination.

111 Eben Kaplan, ‘Backgrounder: Targeted Killings’, *Council on Foreign Relations*, 2 March 2006, <http://www.cfr.org/publication/9627> (accessed 16 November 2009).

112 Kenneth Anderson, *Targeted Killing in US Counterterrorism Strategy and Law: A Working Paper of the Series on Counterterrorism and American Statutory Law, a joint project of the Brookings Institution, the Georgetown University Law Center, and the Hoover Institution*, 11 May 2009, p. 15.

113 *ibid.*, p. 2.

114 *ibid.*, p. 17; Associated Press, ‘U.N. Investigator Warns U.S. on Drone Killings’, 28 Oct 2009.

115 BBC News, ‘US “Still Opposes” Targeted Killings’, 6 November 2001, [http://news.bbc.co.uk/1/hi/world/middle\\_east/2408031.stm](http://news.bbc.co.uk/1/hi/world/middle_east/2408031.stm) (accessed 16 November 2009).

116 *The Public Committee Against Torture in Israel v. the Government of Israel*, HCJ 769/02, 11 December 2005, para. 2. [hereinafter *Targeted Killings Case*]

117 Amnesty International, ‘Israel and the Occupied Territories: Israel must end its policy of assassinations’, AI Index: MDE 15/056/2003, 4 July 2003.

118 Kenneth Roth, ‘The Law of War and the War on Terror’, *Foreign Affairs*, vol. 83, 2004.

119 For example, David Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?’, *European Journal of International Law*, vol. 16, no. 171, 2000, pp. 199–200.

distinction that it intended to answer.<sup>120</sup>

In 2005, the Supreme Court of Israel ruled on the policy of targeted killing. Though the court's decision is controversial, its deliberations are revealing about the policy, and how some states might defend the practice. The court accurately pinpointed the vital questions regarding terrorists in armed conflict.

Are terrorist organizations and their members combatants, in regards to their rights in the armed conflict? Are they civilians taking an active part in the armed conflict? Are they possibly neither combatants nor civilians? What, then, is the status of those terrorists?<sup>121</sup>

The court determined that the conflict in question was international in nature, unlike Afghanistan. Nevertheless, many of the principles it dealt with are still relevant to the issue of targeted killing. The court recognised the customary nature of the principle that 'the civilian population as such, as well as individual civilians, shall not be the object of attack'.<sup>122</sup> Yet it also noted that its adversaries were not 'commanded by a person responsible for his subordinates', did not 'have a fixed distinctive emblem recognizable at a distance' or 'carry arms openly', nor did they obey the laws of war. In other words, they do not meet the conditions to be combatants in an international armed conflict.<sup>123</sup>

Therefore, the judges turned to the principle of direct participation in hostilities to navigate what it calls 'unlawful combatants'. The court defined legitimate targets from this group as

[P]eople who take active and continuous part in an armed conflict, and therefore should be treated as combatants, in the sense that they are legitimate targets of attack, and they do not enjoy the protections granted to civilians. However, they are not entitled to the rights and privileges of combatants, since they do not differentiate themselves from the civilian population, and since they do not obey the laws of war.<sup>124</sup>

This raises all the questions that the ICRC document was intended to clarify. The court did not attempt to label terrorists 'combatants', but chose instead to define them as civilians

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120 Program on Humanitarian Policy and Conflict Research at Harvard University, 'IHL and Civilian Participation in the OPT', Harvard University, October 2007.; Schmitt (n 98).

121 *Targeted Killings Case* (n 116) para. 23.

122 *ibid.*, para. 26.

123 *ibid.*, para. 24.

124 *ibid.*, para. 27.

taking direct part in hostilities who may be ‘treated as combatants’.<sup>125</sup>

The justices interpreted ‘direct part’ and the temporal scope of ‘for such time’ in such a way as to establish a distinction between what are sometimes called ‘one-off terrorists’ and ‘a civilian who has joined a terrorist organization which has become his “home”’.<sup>126</sup> The latter, according to the decision, may be targeted at any time since his or her participation represents a ‘chain of acts’ with only intermittent respite.<sup>127</sup> In some respects, this idea has parallels with the notion of ‘continuous combat function’, although the Israeli version is potentially more permissive, especially as the court argued that

the ‘direct’ character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take ‘a direct part’. The same goes for the person who decided upon the act, and the person who planned it.<sup>128</sup>

Setting aside broader analysis of the quality of the court’s arguments in this case, it is clear that the contention it made for the targeting of terrorists is not transferrable to drug traffickers. First, the court’s decision defines ‘hostilities’ as ‘acts which by [their] nature and objective are intended to cause damage to the army’.<sup>129</sup> The court then adds, ‘It seems that acts which by [their] nature and objective are intended to cause damage to civilians should be added to that definition’.<sup>130</sup> Therefore, even as the court broadens legitimate targets to include the entire chain of command, it limits the hostile acts they are involved in to targeting civilians or the military. This part is consistent with the ICRC Guidance and, as already noted above, the actions of drug traffickers simply do not meet either definition.

Furthermore, the Israeli Supreme Court explicitly excluded those ‘who aid the unlawful combatants by general strategic analysis, and grants them logistical, general support, including *monetary aid*’<sup>131</sup> (emphasis added). Therefore, while the court deems some cases of targeted killings lawful, it drew a very clear distinction between what it views as legitimate targeting and what is being proposed for these fifty drug traffickers in Afghanistan.

The United States has offered far less detailed reasoning on its use of targeted killing of al Qaeda operatives. But a discussion between the US and the Special Rapporteur for

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<sup>125</sup> Hilly Moodrick-Even Khen, ‘Can We Now Tell What “Direct Participation in Hostilities Is?”’, *Israel Law Review*, vol. 40, no. 213, 2007, p. 223.

<sup>126</sup> *Targeted Killings Case* (n 116) para. 39.

<sup>127</sup> *ibid.*

<sup>128</sup> *ibid.*, para. 37.

<sup>129</sup> *ibid.*, para. 33.

<sup>130</sup> *ibid.*

<sup>131</sup> *ibid.*, para. 35.

extrajudicial, summary, or arbitrary executions, revealed at least some insight to the US view of its rights and obligations regarding the practice. Although the government largely dismissed the special rapporteur's competence to consider the issue, it nevertheless argued that

The continuing military operations undertaken against the United States and its nationals by the Al Qaida organization both before and after September 11 necessitate a military response by the armed forces of the United States. To conclude otherwise is to permit an armed group to wage war unlawfully against a sovereign state while precluding that state from defending itself. The law of armed conflict (also known as international humanitarian law) is the applicable law in armed conflict and governs the use of force against legitimate military targets ... Under that body of law, enemy combatants may be attacked unless they have surrendered or are otherwise rendered *hors de combat*. Al Qaida terrorists who continue to plot attacks against the United States may be lawful subjects of armed attack in appropriate circumstances.<sup>132</sup>

The United States makes mention of 'military operations' being taken against the US and its citizens as well as 'terrorists who continue to plot against the United States'. Like Israel, this view quite clearly limits attacks against to those participating in hostilities, rather than the overall war effort, or 'nexus' targets as it were. While this statement from the US does not rely on detailed legal arguments, it is nonetheless very clear that *terrorists* are the intended targets and not their supporters or financiers. According to the arguments above, the US seems intent on targeting those who present a direct threat. Thus one can only conclude that this more recent proposal to target drug traffickers signifies an expansion of its definitions and the creation of a different category of persons it considers to be legitimate targets, a category that clearly falls afoul of international humanitarian law.

Citing the US military's internal manuals, it has been written that the government defines lawful targets as those who 'effectively contribute to the enemy's war-fighting/war sustaining capability'.<sup>133</sup> However this view is so potentially destructive to the principle of distinction that it is has been repudiated by scholars as well as allied governments.<sup>134</sup> In fact, when the notion of targeting drug traffickers was first proposed in early 2009, many German lawmakers angrily condemned the proposal as unlawful.<sup>135</sup> However, unlike the latest plan,

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<sup>132</sup> Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Summary of cases transmitted to Government and replies received* (12 March 2007) UN Doc. No. A/HRC/4/20/Add.1, pp. 343, 360.

<sup>133</sup> Akande (n 5).

<sup>134</sup> *ibid.*

<sup>135</sup> Mathais Gebauer & Susanne Koebl, 'Orders to Kill Angers German Politicians', *Spiegel Online*, 29 January 2009, <http://www.spiegel.de/international/world/0,1518,604430,00.html> (accessed 18 November 2009).

the earlier scheme did not apparently require there be any proven link to the insurgency.<sup>136</sup> Thus the more recent proposal has raised fewer vocal condemnations from elected officials than before.

## Conclusion

Drug traffickers are clearly not ‘combatants’ or ‘fighters’ in the sense intended by international humanitarian law. They remain civilians, and as such are subject to arrest and prosecution. Organised criminals plague any number of societies around the world, but the vast majority of them should not be in the line of fire of state militaries, even when operating in an armed conflict. As such, the US military’s policy to kill *suspected* drug traffickers is inconsistent with multiple principles of international humanitarian and human rights law.

There is no argument over the nexus between the drug trade and the Taliban. The insurgency has clearly exploited Afghanistan’s lucrative heroin trade to subsidise its efforts to topple the Karzai government. Yet legitimate targeting hinges on membership in an armed group or direct participation in hostilities. While these topics are notoriously nebulous areas of international law, they have received much-needed clarification from the ICRC. The conditions articulated in that document would plainly not allow for the killing of drug traffickers due to their financial support for the Taliban.

However, even before the ICRC released its interpretive guidance, the killing of financiers was established to be unlawful. There is nothing in the treaties relevant to non-international armed conflict that makes targeting sponsors of an insurgency permissible. Even the Israeli Supreme Court decision supporting the assassination of those who directly participate in hostilities explicitly removed financiers from the list of legitimate targets.

Targeting people for death is not an appropriate or legal means for holding those involved in criminal activities accountable for their actions.<sup>137</sup> If a mode of liability can be established, civilian criminals could be prosecuted domestically or even theoretically be brought before the International Criminal Court.<sup>138</sup> As Luis Moreno-Ocampo, the prosecutor of the ICC, once said, ‘Investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for the prosecution of crimes already committed.’<sup>139</sup>

<sup>136</sup> Akande (n 5).

<sup>137</sup> *Third Expert Meeting* (n 40) p. 44.

<sup>138</sup> Fabricio Guariglia, ‘Prosecutorial Discretion-Selection of Situations and Cases’ presented at the *Summer Course on the International Criminal Court at the Irish Centre for Human Rights*, 24 June 2009.

<sup>139</sup> Stéphanie Maupas, ‘The Prosecutor’s Strategy Revealed’, *Crimes of War Project: The Magazine*, December 2003, [http://www.crimesofwar.org/icc\\_magazine/icc-maupas.html](http://www.crimesofwar.org/icc_magazine/icc-maupas.html) (accessed 30 July 2009).



ORIGINAL ARTICLE

## ***Yong Vui Kong v. Public Prosecutor* and the Mandatory Death Penalty for Drug Offences in Singapore: A Dead End for Constitutional Challenge?**

Yvonne McDermott\*

### ABSTRACT

This article examines constitutional challenges to the mandatory death sentence in Singapore, with particular reference to the most recent case of *Yong Vui Kong v. Public Prosecutor* (2010). It discusses whether the Court of Appeal was too hasty in disregarding more recent jurisprudence of the Privy Council, which held the mandatory death sentence as a form of inhuman treatment or punishment. It also examines the customary international law prohibition of the mandatory death penalty, and the imposition of the mandatory death penalty for drug offences as a breach of the equality guarantee in Singapore's constitution. The article reveals a dismal future for a nuanced and sensible approach towards drug crime in Singapore, in that the latest case closes off many avenues for constitutional litigation.

On 14 May 2010, the Court of Appeal in the Republic of Singapore upheld the death penalty imposed on 22-year old Malaysian national Yong Vui Kong, who was 19 years of age when he was arrested in 2008. He had been convicted of trafficking not less than 42.27g of diamorphine and sentenced to death in 2009<sup>1</sup> under s 5(1)(a) of the Misuse of Drugs Act,<sup>2</sup> which provides for a mandatory sentence of death for trafficking in 15g or more of the substance.

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<sup>1</sup> *Public Prosecutor v. Yong Vui Kong* [2009] SGHC 4 [hereinafter, 'Judgment'].

<sup>2</sup> Cap 185, 2008 Rev Ed.

The appeal of the original decision related to the constitutionality of the mandatory nature of the death penalty, as provided for by the Misuse of Drugs Act. This was not the first appeal of its kind before the Singaporean courts. In 1980, an appeal against the mandatory death penalty for trafficking in drugs was dismissed in the case of *Ong Ah Chuan*,<sup>3</sup> while the mandatory death penalty was similarly upheld in the case of *Nguyen* in 2004.<sup>4</sup> Both *Ong Ah Chuan* and *Nguyen* were unsuccessful in their arguments that the mandatory death penalty violated Articles 9 and 12 of the Singaporean constitution, which cover the protection against deprivation of liberty without due process of the law and the right to equal protection of the law, respectively.

Leave to appeal the applicant's initial sentence was granted on the basis of two principal submissions made by his counsel: that the two aforementioned decisions were decided wrongly at that time, and that the circumstances had changed to such a degree that the court should now be in a position to deem the mandatory death penalty in the Misuse of Drugs Act unconstitutional.<sup>5</sup> Like the preceding *Ong Ah Chuan* and *Nguyen* cases, the challenge was grounded in Article 9 and Article 12 of the constitution.

As with the court's judgment, this article does not propose to deal with the issue of the legal validity of the death penalty *per se*, but rather the continuing significance and legitimacy of the mandatory death penalty for drug offences. A downward trend in the number of countries that impose the death penalty has continued over the last four decades.<sup>6</sup> As Amnesty International has noted, since 2007 alone, eight countries have formally abolished the death penalty for all crimes,<sup>7</sup> leaving the number of *de jure* abolitionist states at ninety-five. The number of countries that have *de facto* abolished the death penalty, that is those retaining capital punishment in their statute books but who have not executed anyone for ten or more years, stands at forty-five.<sup>8</sup> Notably, however, for those fifty-eight countries that retain the death penalty, thirty-two list drug offences as capital offences.<sup>9</sup>

While figures on the exact number of executions in Singapore are not freely available, concern has been raised about its high execution rates.<sup>10</sup> Amnesty International in 2004 estimated that over 400 prisoners had been hanged in the country since 1991, which

3 *Ong Ah Chuan v. Public Prosecutor* [1981] AC 648 [hereinafter, 'Ong Ah Chuan'].

4 *Nguyen Tuong Van v. Public Prosecutor* [2004] 1 SGCA 47 [hereinafter, 'Nguyen'].

5 Judgment (n 1) para. 5.

6 See further, Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective*, Oxford University Press, Oxford, 2008, pp. 18–32.

7 These are: Albania, Cook Islands, Kyrgyzstan and Rwanda (2007); Uzbekistan and Argentina (2008), and Burundi and Togo (2009). Figures from <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>, (accessed 1 October 2010).

8 Roger Hood, 'Abolition of the Death Penalty: China in World Perspective', 1(1) *City University of Hong Kong Law Review* 1, 2009, p. 6.

9 Patrick Gallahue and Rick Lines, *The Death Penalty for Drug Offences: Global Overview 2010*, International Harm Reduction Association, London, 2010, p. 7.

10 European Union Annual Report on Human Rights, 2002, p. 87.

rendered it the state with ‘possibly the highest execution rate in the world relative to its population.’<sup>11</sup> That being said, there has been a decrease in recent years, with reported executions averaging around seven per year over the past decade, compared to twenty-one hangings in 2000 alone.

Of the thirty-two countries that retain the death penalty for drug offences, Singapore is one of just thirteen to keep the mandatory death sentence for drug offences on its statute books, meaning that no mitigating circumstances can be taken into account when imposing the harshest possible sentence. Domestic law also reserves the mandatory death penalty for treason,<sup>12</sup> pre-meditated murder using arms<sup>13</sup> and armed robbery,<sup>14</sup> while misdemeanours such as spitting in public, chewing gum, and leaving the toilet seat up are criminalised.<sup>15</sup> The harsh criminal justice system, paired with the country’s cleanliness, thriving economy and the material wealth of its inhabitants, has led one commentator to dub the small island nation a ‘theme park with the death sentence’.<sup>16</sup>

### **The mandatory death penalty as inhuman treatment or punishment**

Article 9(1) of Singapore’s constitution provides that ‘No person shall be deprived of his life or personal liberty save in accordance with law’. In *Yong Vui Kong*, the appellant argued that the mandatory death sentence imposed contravened this provision in two respects. First, it was argued that the mandatory nature of the sentence was inhuman and, as such, it could not be considered ‘law’ for the purposes of Article 9(1) and the ‘in accordance with the law’ proviso. Second, it was submitted that the phrase ‘law’ ought to include customary international law, and a customary international law norm had emerged such to find that the mandatory death penalty was inhuman treatment, and thus in contravention to international human rights law.

As regards the first strand of this argument, the definition of ‘law’ under Article 2 of the Singaporean constitution must be considered. Article 2(1) defines law as encompassing written law passed by the UK Parliament and having force in Singapore, and common law and custom in so far as it is in operation in Singapore. In *Ong Ah Chuan*, the appellant submitted that the mandatory death penalty invoked a presumption of guilt and, as such,

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<sup>11</sup> Amnesty International, *Singapore: The death penalty - A hidden toll of executions*, January 2004, AI Index: ASA 36/001/2004. Notably, however, Amnesty International’s *Death sentences and executions in 2009* report noted that Singapore carried out one known hanging in 2009, for the second year in a row.

<sup>12</sup> Singapore Penal Code (Cap 224, 2008 Rev Ed), section 121A.

<sup>13</sup> Arms Offences Act (Cap 14, 2008 Rev Ed), section 4.; Singapore Penal Code (Cap 224, 2008 Rev Ed), section 302.

<sup>14</sup> Arms Offences Act, section 4(a).

<sup>15</sup> Vinay Lal, ‘The Flogging of Michael Fay: Culture of Authoritarianism’, *Economic and Political Weekly* (1994), vol. 29, no. 23, pp. 1386–1388.

<sup>16</sup> John Clammer, ‘Framing the Other: Criminality, Social Exclusion and Social Engineering in Developing Singapore’, *Social Policy and Administration* (1997), vol. 31, 136–53, p. 142.

was contrary to fundamental norms of due process. In response, the Prosecutor argued that as the Misuse of Drugs Act was validly passed by Parliament, it thus fell under the rubric of ‘law’ under Article 9(1). The Privy Council was not convinced by this interpretation, and held that regard must be had to ‘fundamental rules of natural justice’,<sup>17</sup> ultimately finding no conflict between the Misuse of Drugs Act and these basic tenets of natural justice. Lord Diplock, rather unconvincingly, argued that a miscarriage of justice or unjust application of the written law could be avoided by recourse to executive clemency.<sup>18</sup>

If the protection of due process in matters concerning the deprivation of life and liberty is not to be considered a ‘fundamental rule of natural justice’, it is difficult to imagine what might be. The court in *Yong Vui Kong* attempted to answer this by stating *obiter* that a piece of legislation designed to act as a judgment against one individual might meet the standard set down in *Ong Ah Chuan*.<sup>19</sup>

However, since the decision of *Ong Ah Chuan* in 1981, the Privy Council’s position on the mandatory death penalty has changed significantly. A string of cases in the intervening time held that a violation of the convicted person’s rights had occurred and that the mandatory death penalty was a form of inhuman punishment.<sup>20</sup>

*Nguyen* first brought this change in the Privy Council’s approach to the Court of Appeal’s attention in 2004. Therein, the court summarily dealt with this argument, surmising after a brief analysis of the relevant decisions that,

We are of the view that the mandatory death sentence prescribed...is sufficiently discriminating to obviate any inhumanity in its operation. It is therefore constitutional.<sup>21</sup>

This position, particularly the lack of explanation as to *why* the law was ‘sufficiently discriminating’, has been heavily criticised by several academics.<sup>22</sup> In his statement in the

17 *Ong Ah Chuan* (n 3) pp. 670–671

18 This is one of the principal arguments put forward by ‘Chief Justice Truepenny’ in Lon L. Fuller’s *Speluncean Explorers* fable, heavily criticised by his ‘fellow judges’ as basing his reasoning on extraneous factors to the case at hand, when the role of the judge is to interpret and apply the law. Lon L. Fuller, ‘The Case of the Speluncean Explorers in the Supreme Court of Newgarth, 4300’, *Harvard Law Review* (1949), vol. 62 no.4, p.616.

19 Judgment (n 1) para. 16, referring to *Don John Francis Liyanage v. The Queen* [1967] 1 AC 259.

20 *Inter alia*, *Reyes v. The Queen* [2002] 2 AC 235; *Boyce and anor. v. The Queen* [2005] 1 AC 400; *Watson v. The Queen (Attorney General for Jamaica intervening)* [2005] 1 AC 472, and *Matthew v. State of Trinidad and Tobago* [2005] 1 AC 433; *R v Hughes* [2002] UKPC 12; *Fox v. The Queen* [2002] 2 AC 284, and *Bowe (Junior) & Anor. v. The Queen* [2006] 1 WLR 1623.

21 *Nguyen* (n 4) para. 83.

22 For an analysis, Li-ann Thio, ‘The Death Penalty as Cruel and Inhuman Punishment Before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in *PP v Nguyen Tuong Van*’, *Oxford University Commonwealth Law Journal*, 2004, vol. 4, no.2, pp. 213–226.; Michael Hor, ‘The Death Penalty in Singapore and International Law’, *Singapore Yearbook of International Law*, 2004, vol. 8, pp. 105–117.; CL Lim, ‘The Constitution and the Reception of Customary International Law: *Nguyen Tuong Van v. Public Prosecutor*’, *Singapore Journal of Legal Studies*, 2005, pp. 218–233.

aftermath of the decision, the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, expressed his concern that the precedent laid down in *Boyce and Joseph v. The Queen*<sup>23</sup> had not been given due weight.<sup>24</sup> Therein, the majority held that the maintenance of the mandatory death penalty would ‘not be consistent with the current interpretation of various human rights treaties to which Barbados is a party’.<sup>25</sup> Moreover, the appellants had submitted that, ‘No international human rights tribunal anywhere in the world has ever found a mandatory death penalty regime compatible with international human rights norms’, and this assertion was not contradicted by the court.<sup>26</sup>

In *Reyes v. The Queen*, Lord Bingham of Cornhill stated that,

To deny the offender the opportunity, before the sentence is passed, to seek to persuade the court that in all circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity.<sup>27</sup>

We are of the view that respect for the offender’s ‘basic humanity’ must surely come under the ‘fundamental rules of natural justice’ as underlined in the earlier decision of *Ong Ah Chuan*. It may be logical to surmise, as did Lord Bingham in the case of *Bowe v. The Queen*,

[T]hat it took some time for the legal effect of entrenched human rights guarantees to be appreciated, not because the meaning of the rights changed but because the jurisprudence was... unfamiliar.<sup>28</sup>

However, the submissions to this effect made by counsel for Yong Vui Kong were met with a certain degree of hysteria, with the Court of Appeal saying that it ‘borders on the fanciful’ to suggest that Lord Diplock in *Ong Ah Chuan* may have incorrectly assessed the nature of the mandatory death penalty or, in the alternative, that *Nguyen* applied the wrong interpretation of the word ‘law’.

Unlike *Nguyen*, which denied the Article 9(1) submission on the reasoning (however underdeveloped) that the Misuse of Drugs Act was sufficiently discriminatory to not be inhuman, the present case went to great lengths to show that the Privy Council cases were based on the relevant national constitutions, which contain a prohibition against torture,

<sup>23</sup> *Boyce and anor. v. The Queen* (n 20).

<sup>24</sup> Statement by Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, regarding Singapore, 17 November 2005.

<sup>25</sup> *Boyce and anor. v. The Queen* (n 20) para. 6.

<sup>26</sup> Alston (n 24).

<sup>27</sup> *Reyes v. The Queen* (n 20) para. 43.

<sup>28</sup> *Bowe (Junior) & Anor. v. The Queen* (n 20) para. 42.

inhuman or degrading treatment, and that as the Singaporean constitution contains no such provision, the court was not bound to take them into consideration.<sup>29</sup>

After Singapore seceded from Malaysia in 1965, a temporary constitution was adopted. This was primarily based on the state constitution of Singapore, which was intended to work for the state within a federation setting, with a mix of elements from the Republic of Singapore Independence Act 1965 and portions of the Malaysian Federal Constitution imported through the Republic of Singapore Independence Act.<sup>30</sup> In order to ensure that minorities were duly protected in the new constitution, Chief Justice Wee Chong Jin was asked to convene a constitutional commission to consider how such protections might be included in the new constitution.<sup>31</sup> Among its recommendations, the Wee Commission proposed that three new articles be included: one on the prohibition against torture, one on the right to vote and one on the right to a judicial remedy.<sup>32</sup> The government considered these suggestions, and noted that they would be ‘incorporated in some form in the new Constitution to be drawn up’.<sup>33</sup> However, no new constitution was ever developed, and the temporary constitution of December 1965 essentially remains the version in place today. In 1969, the Constitution (Amendment) Act 1969 was passed to give effect to one of the Wee Commission’s recommendations, to date the only recommendation so adopted, on the establishment of a Presidential Council for Minority Rights.<sup>34</sup>

The Court of Appeal in *Yong Vui Kong* interpreted the adoption of only one of Chief Justice Wee’s recommendations as an ‘unambiguous’ rejection of the proposed Article 13 preventing torture, inhuman or degrading treatment or punishment ‘whatever the reasons for such rejection were’.<sup>35</sup> With respect, the explicit approval of the three proposed new articles by the Parliament must bear some weight, especially since the judgement just three paragraphs later relies on the fact that ‘the Government has expressed the view that torture is wrong’ in parliamentary debates to prevent the logical consequence of its reasoning, discussed below, that laws permitting torture, as well as what is widely-recognised as inhuman treatment in this case, would be regarded as ‘law’ for the purposes of Article 9(1).<sup>36</sup> In this regard, the court clearly applies double standards as regards the weight which must be given to parliamentary debates.

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29 Lai J did refer to the differing constitutional traditions and human rights obligations of Belize and the United States of America, respectfully, to distinguish the cases of *Reyes and Watson* [2005] 1 AC 472 from *Nguyen*. Arun K Thiruvengadam describes this position as ‘nitpicking’, which fails to address the substantive issues underlying those decisions (‘Comparative law and constitutional interpretation: Insights from Constitutional Theory’, in Li-ann Thio and Kevin YL Tan (eds.) *Evolution of a Revolution: Forty years of the Singapore Constitution*, Routledge, London, 2009, pp. 113–152 at p. 145.

30 Kevin YL Tan, ‘State and Institution Building through the Singapore Constitution, 1965-2005’ in Thio and Tan (n 29), p. 54.

31 Li-ann Thio, ‘The passage of a generation: Revisiting the report of the 1966 Constitutional Commission’ in Thio and Tan (n 29) pp. 8–9.

32 *ibid.*, p. 16.

33 Edmund William Barker, Minister for Law and National Development, *Singapore Parliamentary Debates, Official Report*, 21 December 1966, vol. 25, cols. 1052–1053.

34 Act 19 of 1969.

35 Judgment (n 1) para. 72.

36 *ibid.*, para. 75.

Furthermore, in the intervening forty years, the Wee Report's other two suggestions have been recognised as 'unenumerated rights' in the Singaporean constitution.<sup>37</sup> The first, the right to a judicial remedy, was read into the provisions of Article 93 of the constitution (on judicial power) by the High Court in *Colin Chan v. PP*,<sup>38</sup> while the Attorney-General was asked to provide a report to the Parliament in 2002 on whether there was a right to vote entrenched in the constitution. On this, he opined that 'the right to vote at parliamentary and presidential elections is implied within the structure of our Constitution.'<sup>39</sup> In the light of this evidence that there are unenumerated rights implicit in the Singaporean constitution, the court's position that the Wee Commission only suggested a provision against torture (and for that matter, the right to vote and to a judicial remedy) 'because Article 9(1) did not deal with the same subject matter...otherwise, [it] would have been redundant',<sup>40</sup> must be taken with a pinch of salt.

In an attempt to copper fasten its reasoning as to why the absence of a prohibition against torture in Singapore's constitution should render the numerous Privy Council decisions on the mandatory death penalty irrelevant, the Court of Appeal invokes a cultural relativist argument in paragraph 73 of its judgment.

In this connection, we wish to highlight Lord Bingham's observation in *Reyes* at [28]...that states are not bound to give effect in their Constitutions to norms and standards accepted elsewhere, perhaps in very different societies.

In making this argument, the Court of Appeal appeared to overlook a number of judgments passed in rather different societies – Malawi,<sup>41</sup> Uganda<sup>42</sup> and most recently Kenya<sup>43</sup> – which have accepted the reasoning of the Privy Council in this regard when interpreting their own domestic constitutions.

Moreover, in the case of *Mithu v. State of Punjab*,<sup>44</sup> the Indian Supreme Court was asked to rule on the constitutionality of Section 303 of the Indian Penal Code, which provided for the mandatory death sentence for persons serving a life sentence who committed murder while serving that sentence. Whether or not one considers India and Singapore to be 'very different societies', the fact remains that Articles 14 and 21 of the Indian constitution are

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37 On this point, see Li-ann Thio, 'Protecting Rights' in Thio and Tan (n 29), pp. 202–204.

38 [1994] 3 SLR 662, p. 681

39 Thio (n 37) citing 73 *Singapore Parliamentary Reports*, 16 May 2001, col. 1720, at 1726.

40 Judgment (n 1) para. 72.

41 *Kafantayeni and Others v Attorney General*, Constitutional Case No. 12 of 2005 [2007] MWHC 1, 27 April 2007, pp. 6, 10.

42 *Attorney General v Susan Kigula & 417 Others*, Constitutional Appeal No. 3 OF 2006 [2009] UGSC 6, 21 January 2009.

43 *Godfrey Ngotho Mutiso v Republic*, Criminal Appeal 17 of 2008 [2010] eKLR, 30 July 2010, para. 32.

44 AIR 1983 SC473 [hereinafter, 'Mithu'].

almost identical to Articles 9 and 12 of the Singaporean model. Importantly, like Singapore, India's constitution contains no express prohibition on torture, inhuman or degrading treatment or punishment. The Indian Supreme Court struck down Section 303 as being 'arbitrary and oppressive', stating that 'it must go the way of all bad laws.'<sup>45</sup> The court stated that a 'provision of law which deprives the Court of its wise and beneficent discretion in a matter of life and death, without regard to the circumstance in which the offence was committed...cannot but be regarded as harsh, unjust and unfair.'<sup>46</sup>

In *Nguyen*, Liu J differentiated *Mithu* on the basis that, apparently, it was clear in that case that there was no 'rational justification' for imposing sentence against those serving life sentences, as opposed to others convicted of murder, whereas it was not as apparent that there was no rational justification for the 15g differentia.<sup>47</sup> He did not elaborate on that point, nor on why the rational justification was more apparent in the case of trafficking of a specific amount of a controlled substance.<sup>48</sup>

The Court of Appeal in *Yui Vui Kong* also rejected the precedent of *Mithu* but gave a more detailed reasoning for doing so. First, it opined, *Mithu* was decided on the grounds of the Indian constitution which uses the phrase 'according to procedure established by law'. The Indian Supreme Court stated that taking autonomy away from judges 'in a matter of life and death' was not fair, just or reasonable. Instead of the phrase 'according to procedure established by law', Article 9(1) uses the wording 'in accordance with the law'. Thus, the Court of Appeal argued, the Court need not concern itself with procedural safeguards, as the Indian courts must.<sup>49</sup> To draw a distinction between the phrases 'in accordance with the law' and 'according to procedure established by law' is nitpicking at best, and disingenuous at worst.

The Court further followed *Ong Ah Chuan* in holding that applying the *Mithu* test 'requires the Court to intrude into the legislative sphere of Parliament as well as engage in policy making'.<sup>50</sup> However, the court's reasoning here displays an excessive and unreasonable deference to the executive and legislative branches of government. Article 93 of Singapore's constitution grants judicial power onto the judiciary and confers on the judges the right of judicial review of any official power. The court's reasoning throughout, as exemplified in this rejection of the *Mithu* case, shows a worrying subservience to the legislative and executive branches.

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<sup>45</sup> *ibid.*, para. 25.

<sup>46</sup> *ibid.*, para. 12.

<sup>47</sup> *Nguyen* (n 4) para. 74.

<sup>48</sup> *Thiruvengadam* (n 29) p. 146.

<sup>49</sup> *Judgment* (n 1) para. 80.

<sup>50</sup> *ibid.*

Further, the court took issue with what it saw as an almost renegade Indian Supreme Court which, since the ‘extreme position’ taken in *Mithu*, has ‘expanded the scope of Article 21 even further to include...the right to education, the right to health and medical care and the right to freedom from noise pollution.’<sup>51</sup> Perhaps the court was concerned with the possibility that the elusive ‘floodgates’, often referred to in constitutional jurisprudence, would open, but each further case based on Article 21’s equivalent, Article 9, would have to be decided on its individual merits. Later, unrelated jurisprudence ought to have no bearing on the weight of a case with the same facts based on almost identical constitutional provisions.

By the same token, the fact that *Mithu* was based on denying the judiciary the power to decide an appropriate sentence would, according to the Singaporean court, have the effect of declaring *all* fixed sentences proscribed by the legislature unconstitutional.<sup>52</sup> In fact, as in the U.S. case of *Woodson*,<sup>53</sup> the Indian court distinguished the finality and severity of the punishment concerned as necessitating a different, procedurally safer, position.

Thus, in comparison to its blanket rejection of Privy Council decisions post-*Ong Ah Chuan*, the Court of Appeal was forced to proffer some very specific and somewhat far-fetched reasons for rejecting the *Mithu* standard. In spite of their specific differences, there is an argument to be made that the sum of these constituent cases should add to a whole that casts doubt on the appropriateness of the mandatory death penalty as a sentence, in spite of the lack of an explicit prohibition on torture/inhuman or degrading treatment in the Singaporean constitution. This line of reasoning was put forward by the appellant in arguing that term ‘law’ must include customary international law, which prohibits inhuman punishment generally and proscribes the mandatory death penalty as a form of inhuman punishment specifically.

### **The customary international law prohibition of the mandatory death penalty**

Counsel for *Yong Vui Kong* had proposed that the word ‘law’ in Article 9(1) be interpreted so as to include customary international law. As mentioned above, the term ‘law’ as defined by Article 2(1) of the constitution is to include ‘any custom or usage having the force of law in Singapore’. The Court of Appeal was not convinced that sufficient reason had been given by the appellant as to why customary international law should be considered to be part of ‘law’ for the purposes of Article 9(1). However, even the Attorney General had conceded that ‘law’

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<sup>51</sup> *ibid*, para. 83.

<sup>52</sup> *ibid*, para. 81.

<sup>53</sup> *Woodson et al v. North California* (1976) 428 US 280.

should indeed include customary international law.<sup>54</sup> The court interpreted this concession to mean that the Attorney General did not intend to aver that any customary norm should become domestic law immediately, stating,

It seems clear enough to us that what the AG meant when he said that the expression ‘law’ should be interpreted to include CIL was that this expression would include a CIL rule which had already been recognised and applied by a domestic court as part of Singapore law.<sup>55</sup>

In this sense, it was held that rules of customary international law cannot become part of domestic law ‘until and unless it has been applied as or definitively declared to be part of domestic law by a domestic court.’<sup>56</sup>

This reasoning is rather flimsy as regards the customary international prohibition on torture, inhuman or degrading treatment or punishment for two reasons. First, the need for a declaration or application of the customary rule by a domestic court does not logically stand as a reason why *this* domestic court could not apply a customary rule. Second, following the court’s reasoning, it would mean that as long as there was no positive law or judicial pronouncement to the contrary, there could be no customary international law against torture, for example, applied in the domestic context. To counter this lacuna of logic, the court noted the fact that the Government has ‘expressed the view that torture is wrong’ in parliamentary debates.<sup>57</sup> This is a direct contradiction to its own reasoning on the need for a domestic *court* to apply a customary rule before it becomes part of domestic law and also the little weight given to parliamentary debates following the Wee Report, as mentioned above.

The court went on to deny that international legal norms or Singapore’s international legal obligations could be used to read provisions into the constitution that were not expressly provided for therein, stating instead that they had a duty to interpret international obligations consistently with domestic law only insofar as is possible.<sup>58</sup> This strictly textualist approach in interpreting the constitution is a far cry from the decision in *Ong Ah Chuan*, which made reference to the ‘fundamental rules of natural justice’ and recognised that if the constitution was not interpreted as protecting certain fundamental liberties, it ‘would be little better than a mockery’. It is also at odds with the court’s reasoning in *Nguyen*, which,

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<sup>54</sup> Judgment (n 1) para. 44.

<sup>55</sup> *ibid.*, para. 44.

<sup>56</sup> *ibid.*, para. 91.

<sup>57</sup> *ibid.*, para. 75.

<sup>58</sup> *ibid.*, para. 59.

despite holding that it had not been firmly established that death by hanging fell under the accepted customary international law prohibition against cruel and unusual punishment, appeared open to using international law in domestic courts, explicitly accepting that Article 5 of the Universal Declaration of Human Rights constituted customary international law.<sup>59</sup>

The appellant, presumably expecting the Court of Appeal to show a similar openness to customary international law as it did in *Nguyen*, argued that the mandatory death penalty fell under this customary international law prohibition on torture, cruel, inhuman or degrading treatment or punishment. Justification for this position was given with reference to the numerous Privy Council decisions, as stated above, and other decisions like the case of *Woodson et al. v. North California*,<sup>60</sup> which ruled that the mandatory nature of the sentence was inhuman because it dehumanised individual offenders and treated them not as human beings but as a 'faceless, undifferentiated mass'.<sup>61</sup>

There is generally an overall trend outlawing the mandatory death sentence in the past twenty years, with the most recent Asian case being the Bangladeshi High Court's decision in *BLAST and another vs. Bangladesh and others* ['Shukur Ali' Case] of 2 March 2010,<sup>62</sup> which held that Section 6(2) of the Nari-O-Shishu Nirjatan (Bidesh Bidhan) Act, 1995 was unconstitutional. The court said judges should be given the opportunity to examine the circumstantial conditions and credibility of evidences and witnesses when awarding punishment. Other notable developments include a decision of the Inter-American Court of Human Rights in 2009 denouncing the mandatory death penalty,<sup>63</sup> a Ugandan Supreme Court ruling outlawing the practice in January of that year<sup>64</sup> and a similar decision of the Kenyan Court of Appeal in Mombasa in July 2010.<sup>65</sup>

The Attorney General of Singapore justified the continued use of the mandatory death sentence by pointing out that thirty-one states retain the mandatory death penalty for 'drug-related and other serious offences',<sup>66</sup> while counsel for the appellant argued that only fourteen countries apply the mandatory sentence for drug-related offences. The court followed the Attorney General's reasoning and held that there was insufficient *opinio juris* to justify a finding that a customary prohibition existed.<sup>67</sup> This was in spite of the fact that 93%

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59 *Nguyen* (n 4) para 85.

60 *Woodson et al v. North California* (n 54).

61 *ibid*, pp. 303–305.

62 *BLAST and another v. Bangladesh and others* ['Shukur Ali' Case], Writ Petition No. 8283 of 2005, High Court Division of the Supreme Court of Bangladesh, 2 March 2010.

63 *DaCosta Cadogan v. Barbados*, Judgment of September 24 2009, Inter-American Court of Human Rights.

64 *Attorney General v. Susan Kigula and 417 Others*, No. 03 of 2006, Ugandan Supreme Court, 21 January 2009.

65 *Godfrey Ngotho Mutiso v. Republic* (n 43).

66 Judgment (n 1) para. 94.

67 *ibid*, para. 99.

of the states in the world do not have laws which impose the mandatory death penalty for drug offences.<sup>68</sup>

In practice, however, only six of these states practice executions for drug offences to such a degree that they could be regarded as ‘highly committed’ to the practice: China, Iran, Saudi Arabia, Viet Nam, Singapore and Malaysia.<sup>69</sup> In fact, some of the states which retain the mandatory death penalty on their statute books are considered *de facto* abolitionist states. For example, Brunei-Darussalam, which adopted such legislation in 2001,<sup>70</sup> has not executed anyone since 1959, and India is thought to have never carried out an execution under its Narcotics and Psychotropic Substances Act, as amended in 1989.<sup>71</sup>

### **The mandatory death penalty as a breach of the equality provisions of Singapore’s constitution**

The appellant’s final argument was that the differentia under which the mandatory death penalty was imposed was arbitrary, and thus incompatible with the equality provision in Article 12(1) of the Singaporean constitution. This argument (also raised in *Ong Ah Chuan*) centred on the proposition that the ‘15g differentia’ under the Misuse of Drugs Act was arbitrary insofar as it ruled that once an individual was found to be in possession of more than 15g of diamorphine, he or she was presumed to be trafficking in that substance, and no mitigating factors could be taken into account.<sup>72</sup>

The 15g differentia as the benchmark for imposing the death penalty was introduced by the Misuse of Drugs (Amendment) Act, 1975. The then Minister for Home Affairs and Education, stating that the law was ‘not intended to sentence petty morphine and heroin peddlers to death’ declared that it was ‘necessary to specify the quantity by weight, exceeding which the death penalty will be imposed.’<sup>73</sup> No legal or scientific justification was put forward, aside from the relative leniency apparently shown by this approach in comparison to Iran, where trafficking in 10g or more attracts a sentence of death.<sup>74</sup> Since the passage of this Act, Brunei’s relevant legislation followed suit with the 15g differentia, while Bangladesh’s Narcotics Control Act 1990 makes it possible to sentence people to death if caught with more than 25g of heroin.<sup>75</sup>

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68 That is, UN member states, of which there are 192.

69 Gallahue and Lines (n 9).

70 Misuse of Drugs Act, 2001.

71 Gallahue and Lines (n 9) p. 41, citing US Department of State, 2009 International Narcotics Control Strategy Report, Volume I, 27 February 2009.

72 Judgment (n 1) paras. 101–104.

73 *Singapore Parliamentary Debates, Official Report* (20 November 1975) at col 1382.

74 *ibid.*

75 Gallahue and Lines (n 9) p. 36.

It is difficult to determine what makes trafficking in 15g of a controlled substance so much worse than 14.99g, yet *Ong Ah Chuan* held that the 15g differentia 'bears a reasonable relation to the social object of the law'. As counsel for the appellant Yong Vui Kong pointed out, an offender can be caught multiple times with 14.99g but he who is caught once with 15 g or over will be sentenced to hanging.<sup>76</sup> By the same token, someone who traffics in 15g and someone who traffics in 1,500g would face the same sentence.<sup>77</sup> Moreover, the mandatory nature of the offence means that mitigating circumstances, such as whether there was a voluntary assumption of risk, information on the individual and their likelihood of reoffending cannot be taken into account.<sup>78</sup>

As Amnesty International's 2004 report points out, Clause 18 of the Misuse of Drugs Act states that if someone is caught with the keys to a vehicle or building found to contain drugs, there is a rebuttable presumption that he or she is personally in possession of that quantity of drug.<sup>79</sup> This means, potentially, that if a number of drug users are sharing accommodation, and one is caught with the key to the building in which they are staying which contains an accumulated amount of heroin exceeding 15g, he will be sentenced to the death penalty. This is perhaps an extreme example, but it shows the nonsensical cumulative effect of the mandatory fixed penalty based on the 15g differentia.

*Ong Ah Chuan* and *Nguyen* both rejected the arguments before them based on the principle of equality before the law, finding that if the dissimilarity applied bore a 'reasonable relation'<sup>80</sup> to the object of the law, there could be no inconsistency with the constitution. *Nguyen* declared that a differentiating measure is valid if the classification is founded on an 'intelligible' criterion.

On this question, the Court of Appeal in *Yong Vui Kong* held, unsurprisingly given the amount of autonomy it allowed the legislature in earlier findings, that it was the legislature's prerogative to determine where on the scale between large-scale traffickers and small-time users a given amount would fall. This decision to be based on the information at hand, and bearing in mind the desire to punish those whose position rests nearer to the apex of the distribution pyramid. While it can be argued whether quantity alone is an appropriate policy to differentiate between categories of persons found in possession of drugs, the court found it a 'question of social policy', and so long as it bears a rational relation to the social object, its hands are tied.<sup>81</sup>

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76 Judgment (n 1) paras. 103–104.

77 *ibid*, para. 108.

78 *ibid*, paras. 105–108.

79 Amnesty International Report on Singapore (n 11) p. 13.

80 Or, as in the case of *Nguyen*, a 'rational relation'.

81 Judgment (n 1) paras. 112–113.

It is deference to the legislature's apparent prerogative in deciding the appropriate threshold for imposing the penalty as a policy issue, the court appears to have neglected the fact that sentencing generally falls within the remit of professional judges. Indeed, under Article 93 of the Singaporean constitution, 'The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force'. This article clearly grants judicial power to judges. The Singaporean constitution has a traditional 'separation of powers' function, yet the last three decades has seen a marked increase in 'executive sentencing', whereby the judicial function of sentencing is diluted by a number of legislative acts containing mandatory sentences for given offences.<sup>82</sup> This decision, showing an unquestioning approach towards legislative sentencing, paves a worrying path for the future of judicial independence in Singapore.

### Deterrent Effect

Counsel for Yong Vui Kong raised a final argument in the form of an affidavit with testimony from Prof Jeremy Fagan on the minimal deterrent effect that the death penalty has on drug use and trafficking into Singapore.<sup>83</sup> In response, the Attorney General filed statistics from the UN Office on Drugs and Crime (UNODC) to show that Singapore has one of the lowest drug addiction rates internationally, which the court accepted.<sup>84</sup>

The court's reliance on this UNODC report, insofar as it relates to Singapore, is disingenuous at best. The same report clearly warns that, 'Data from Singapore are registry data and thus not directly comparably with data from other countries'.<sup>85</sup> This 'registry data' comes from people who are in contact with the treatment system or the judicial system of the country, and UNODC itself notes that there is often 'considerable divergence' between it and survey data.<sup>86</sup>

The same report provides statistical analysis of drug prices worldwide. The wholesale price of heroin in Singapore in 2006 was \$5,365/kg, significantly cheaper than in neighbouring Malaysia, where the price was reported at \$7,100/kg.<sup>87</sup> This undermines the claim of any deterrent effect of the mandatory death penalty. If less heroin had entered the country

82 *Inter alia*, the Immigration Act, Vandalism Act, Miscellaneous Offences (Public Order and Nuisance) Act, Undesirable Publications Act, Internal Security Act, the Banishment Act, the Maintenance of Religious Harmony Act, the Environmental Public Health Act, the Singapore Broadcasting Authority Act, and the Telecommunications Authority of Singapore Act, *per* Ross Worthington, 'Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore' *Journal of Law and Society* (2002), 28(4) 490–519, p. 510. Worthington also mentions some interesting statistics on judicial salaries, which are determined solely by the Minister for Finance and increased more than threefold between 1995 and 1998, p. 512.

83 Judgment (n 1) para. 116.

84 *ibid.*, para. 117.

85 UN Office on Drugs and Crime, *World Drug Report 2008*, p. 214.

86 *ibid.*, p. 295. For a further discussion of this critique, see Gallagher and Lines (n 9) pp. 26–27.

87 UN Office on Drugs and Crime (n 85) p. 257.

in 2006, it can be assumed that this would have had the effect of pushing up the cost per wholesale kilo. Yet according to the UNODC report relied upon by the court, this was not the case. In fact, in the East and South-East Asia region, the price per kilo was cheapest in Singapore, and most expensive in the Philippines, where the wholesale price is over \$100,000/kg. Interestingly, the Philippines ceased executing people for drug-related and other offences in 2001.<sup>88</sup> The court's reasoning on the purported 'deterrent effect' of the punishment is therefore highly suspect.

## Conclusion

Against the backdrop of an international culture tending towards abolitionism, the decision of the Court of Appeals reflects the fact that Singapore remains a country clinging tightly to its 'right' to not only execute drug offenders, but to impose a mandatory death sentence on those found to be in possession of a given quantity of a drug, with no scope for considering mitigating factors in sentencing.

The UN Human Rights Committee has criticised those states which retain the death penalty for drug offences, noting such legislation as being contrary to the threshold laid down in Article 6(2) of the International Covenant on Civil and Political Rights, which states that the sentence of death can only be applied for 'most serious crimes',<sup>89</sup> that is intentional crimes with lethal or other extremely grave consequences. As wryly noted in a 2007 report on this issue, although drug use can sometimes have lethal consequences, it is difficult to argue that this outcome is the intention of drug traffickers, as killing one's own customers is generally not seen as a good business model.<sup>90</sup>

Whilst government officials may credit a purported deterrent effect of the mandatory death penalty with saving thousands of lives,<sup>91</sup> no concerted effort has been made to empirically substantiate this claim. Indeed, no compelling evidence has been found in such studies, conducted elsewhere, to support the deterrent effect of either the death penalty<sup>92</sup> or mandatory sentencing generally.<sup>93</sup> In arguing against clemency, Law Minister Mr. K. Shanmugam asserted that,

88 David T. Johnson and Franklin E. Zimring, *The Next Frontier: National Development, Political Change and the Death Penalty in Asia*, Oxford University Press, Oxford, 2009, p. 104.

89 See for example, UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Thailand* (8 July 8 2005) UN Doc No. CCPR/CO/84/THA, para. 14.; UN Human Rights Committee, *Concluding observations of the Human Rights Committee: The Sudan* (29 August 2007) UN Doc No. CCPR/C/SDN/CO/3, para. 19.

90 Rick Lines, *The Death Penalty for Drug Offences: A Violation of International Human Rights Law*, International Harm Reduction Association, London, 2007, p. 12.

91 Zakir Hussain, 'Tough stance on serious crimes saves lives: Minister', *The Straits Times*, 10 May 2010.

92 For example, Hugo Adam Bedau, 'Abolishing the Death Penalty even for the Worst Murderers' in *The Killing State: Capital Punishment in Law, Politics and Culture*, ed. A Sarat, Oxford University Press, Oxford, 1999, pp. 40–59.; Roger Hood, *The Death Penalty: A Worldwide Perspective 3<sup>rd</sup> edn.*, Oxford University Press, Oxford, 2003, pp. 208–232.

93 For example, David McDowall, Colin Loftin and Brian Wiersema, 'A Comparative Study of the Preventive Effects of Mandatory Sentencing Laws for Gun Crimes', *The Journal of Criminal Law and Criminology* (1992), vol. 83(2), pp. 378–394.

Yong Vui Kong is young, but if we say, ‘We let you go’, what is the signal we are sending? We are sending a signal to all the drug barons out there: just make sure you choose a victim who is young, or a mother of a young child, and use them as the people to carry the drugs into Singapore.<sup>94</sup>

This line of reasoning proceeds from the rather dubious assumption that drug barons are more concerned for the wellbeing of their couriers than they are the integrity of their supply lines. Furthermore, its presumption that the imposition of a lengthy term of imprisonment in lieu of hanging would patently be less potent in its deterrent and incapacitatory effects must be treated with due circumspection.

For those whose primary concern is the economic development of Singapore, the most serious consequence of drug crime is really its potential economic fallout. Oehlers and Tarulevicz note that, ‘What is usually identified as gravest...is the escapism that is associated with drug consumption, which if left unchecked, could potentially undermine the strength of human resources in the country, compromising the pursuit of economic development.’<sup>95</sup>

In Singapore, still in a state of nation-building after centuries of subjugation to foreign empire followed by a period of internal tensions, sociologists have opined that the strict criminal law acts as a tool of social control.<sup>96</sup> It is useful to paint Singapore and its citizens as a law-abiding and controlled. To this end, comments such as those of the then Minister for Home Affairs, speaking on the sentencing of US teenager Michael Fay to the punishment of caning for vandalism, are typical of the government’s mindset.

Unlike some other societies which may tolerate acts of vandalism, Singapore has its own standards of social order as reflected in our laws...It is because of our tough laws against anti-social crimes that we are able to keep Singapore orderly and relatively crime free. We do not have a situation where acts of vandalism are commonplace as in cities like New York, where even police cars are not spared the acts of vandals.<sup>97</sup>

As in the case of Yong Vui Kong, who is Malaysian, a very significant proportion of those executed for trafficking offences are nationals of other countries.<sup>98</sup> In this sense, harsh

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94 Hussain (n 91).

95 Alfred Oehlers and Nicole Tarulevicz, ‘Capital Punishment and the Culture of Developmentalism in Singapore, in Sarat (n 92) pp. 298—299.

96 Christopher Tremewon, *The Political Economy of Social Control in Singapore 2<sup>nd</sup> edn.*, Macmillan, London, 1996.

97 Philip Shenon, ‘Singapore, the Tiger Whose Teeth are not Universally Scorned, *New York Times*, 10 April 1994.

98 Oehlers and Tarulevicz (n 95) p. 303, citing Amnesty International, *Amnesty International Report 2003- Singapore* which indicates that out of 174 executions recorded by Amnesty International from press reports between 1993 and 2003, the number of foreign nationals totals 93, which is more than half.

drug penalties may be seen as necessary to protect the state from ‘the dark forces waiting just outside the charmed circle of Singapore’s boundaries.’<sup>99</sup> For example, in 2007, Nigerian Iwuchukwu Amara Tochi and stateless African Nelson Malachy were hanged for drug trafficking offences.<sup>100</sup>

In the cultural politics of the ‘war on drugs’, traffickers are assigned the role of ‘folk devils’.<sup>101</sup> They are framed by the primary definers<sup>102</sup> within Singaporean society, and by the mass media, as entirely ‘other’ and malevolent, threatening to undermine the hard-won economic vibrancy of the state. In *Yong Vui Kong*, the court implicitly suggested that drug offences were of a more serious nature than murder, referring to the Privy Council decisions on the mandatory death penalty, all of which focussed on the sentence for murder.<sup>103</sup> Relying on Lord Diplock’s *dicta* in *Ong Ah Chuan*, the Court of Appeal distinguished between murderers and drug traffickers insofar as the latter are motivated by ‘cold calculated greed’, while murder can be committed in the heat of the moment.<sup>104</sup>

However, the realities of individuals such as Yong Vui Kong and Nguyen crucially undermine this narrative by exposing the brutal reality of the mandatory death penalty and muddying the crisp demarcation between a pure, virtuous society and the monstrous trafficker that is a *sine qua non* to the ascendancy of a harsh, punitive ‘criminology of the other’.<sup>105</sup>

Their stories are heavy with pathos: Both came from poor backgrounds, struggled with family problems and received the death sentence while still painfully young. It could be said they were small fry, mere mules acting under the direction of shadier, more powerful drug lords who hovered out of reach of the law.<sup>106</sup>

In this context, it is difficult to avoid the conclusion that the significance of the mandatory death penalty resides not so much in its efficacy as a practical tool in the suppression of drug trafficking, as in its cultural and symbolic resonance. A harsh policy on drug trafficking may warrant a particular place in Singapore’s developmentalist schema. However, just as the

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99 Clammer (n 16) p. 143.

100 *Iwuchukwu Amara Tochi and Another v Public Prosecutor* [2006] 2 SLR 503.

101 Stanley Cohen, *Folk Devils and Moral Panics 3<sup>rd</sup> edn.*, Routledge, London, 2002.

102 Defined by Hall et. al. as ‘accredited’ sources, generally possessed of a representative status, such as politicians or organised interest groups, or particular expertise, on whose “objective and “authoritative” statements news organisations are dependent. Stuart Hall et. al., *Policing the Crisis*, MacMillan, London, 1978, p. 57.

103 Judgment (n 1) para. 48.

104 *Ong Ah Chuan* (n 3) p. 674.

105 ‘[the] criminology of the other, of the threatening outcast, the fearsome stranger, the excluded and the embittered ... functions to demonize the criminal, to act out popular fears and resentments, and to promote support for state punishment’. David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*, Oxford University Press, Oxford, 2001, p. 131 et seq.

106 Rachel Lin, ‘Why so little data on hanging?’, *The Straits Times*, 18 September 2010.

imposition of exemplary punishment bears ‘surplus meanings’<sup>107</sup> beyond the expediencies of the particular case, so these meanings are ‘always contingent, never certain’ and may serve to undermine the intended purpose.<sup>108</sup> The problematisation of the “evil criminal” status, in particular, ‘exert[s] the most leverage against...structures of legitimacy and feeling.’<sup>109</sup>

It is noteworthy that despite the low level of press freedom in Singapore,<sup>110</sup> an island where newspapers have been described as ‘essentially organs of the state...instruments of only the most desirable propagation’,<sup>111</sup> the *Yong Vui Kong* case has prompted calls for the re-introduction of judicial discretion in the imposition of the death penalty,<sup>112</sup> and greater transparency in its administration.<sup>113</sup>

Yong Vui Kong has been given leave to appeal a separate ruling from the High Court of Singapore concerning the dismissal of his appeal for judicial review of the authority to grant presidential clemency. This hearing will commence in early 2011.<sup>114</sup> While this development may bring some flicker of optimism on an individual level, the fact remains that there are no further avenues for him to pursue on the mandatory death penalty issue following the Court of Appeal’s 14 May decision. The Court of Appeal’s judgment does not bode well for advocates of due process and judicial impartiality in Singapore. Its frankly dubious ruling on several accounts not only upholds the constitutionality of the mandatory death sentence, a penalty quashed by countless decisions worldwide, it also shows a worrying reverence to the executive branch of government. It demonstrates an unwillingness to engage with international law on a domestic level, and an “eyes shut” approach to the sheer futility of the harshest punishment in deterring potential drug traffickers. By continuing to target vulnerable young drug mules like Yong Vui Kong, the legislature in complicity with the judiciary sends a message to those in the highest positions of the Singaporean drug trade can rest assured that their position remains safe for some time to come.

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107 David Garland, ‘Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America’, *Law & Society Review*, 2009, vol. 39 (4), pp. 793–833.

108 *ibid.*, p. 827

109 Philip Smith, *Punishment and Culture*, University of Chicago Press, Chicago, 2008, p. 55.

110 Singapore was ranked as 133<sup>rd</sup> in Reporters Without Borders’ Press Freedom Index for 2009.

111 William Gibson, ‘Disneyland with the Death Penalty’, *Wired*, September/October 1993.

112 KC Vijayan, ‘Keep death penalty but allow leeway’, *The Straits Times*, 11 October 2009.

113 Lin (n 106).

114 ‘Vui Kong’s appeal set for Jan 2011’, *The Online Citizen*, 31 August 2010, <http://theonlinecitizen.com/2010/08/breaking-news-vui-kongs-appeal-set-for-jan-2011> (accessed 1 October 2010).

INTERVIEW

## **Litigating against the Death Penalty for Drug Offences: An interview with Saul Lehrfreund and Parvais Jabbar**

Saul Lehrfreund MBE and Parvais Jabbar are Executive Directors of the The Death Penalty Project, which they have run since its inception.

Based at Simons Muirhead & Burton in London, The Project works to promote and protect the human rights of those facing the death penalty. Although operating in all jurisdictions where the death penalty remains an enforceable punishment, its actions are concentrated in those countries that retain the Judicial Committee of the Privy Council in London and in other Commonwealth countries, principally the Caribbean, Africa and South East Asia.

Alongside its activities representing individuals at risk of execution, The Project also provides expert support to local lawyers and human rights organisations in bringing legal challenges to the application of the death penalty, with notable success in a variety of jurisdictions.

The Project's commitment to providing free legal representation to men and women on death row has been critical in identifying and redressing a significant number of miscarriages of justice, promoting minimum fair trial guarantees, and establishing violations of domestic and international human rights.

Lehrfreund and Jabbar have been involved in litigating or assisting in a number of challenges to the mandatory death penalty for drug offences. Most recently in 2010, they assisted in the *Yong Vui Kong* challenge in Singapore. The International Journal on Human Rights and Drug Policy sat down with them to discuss their experience in these cases.

**You have initiated actions in many countries against the use of the mandatory death penalty. Does challenging the death penalty specifically for drug offences present different or more difficult obstacles, and if so could you describe them?**

Not really. Essentially, the challenge is the same – a challenge to the imposition of a mandatory death sentence. A mandatory death sentence for whatever offence is considered to be arbitrary and disproportionate because it is automatic and fails to take into account any individual mitigating circumstances. The fundamental principle is that because the death penalty is unique in its consequences, individualised sentencing is required before the death penalty can ever be imposed. In other words, sentencing a defendant to death by reference to the category of the offence rather than the individual circumstances of the offence and the offender is arbitrary, disproportionate and contrary to the basic norms of due process.

The death penalty is uniquely different from all other penalties in its finality and irreversibility and in the fact that it engages the most fundamental of all human rights, namely the right to life. If anything, there should be fewer obstacles in challenging the death penalty for drug offences as these offences may not necessarily result in the loss of life or violence against another as compared to some of the worst categories of murder.

Any enacted law that deprives a person of their life in a manner that is found to be unfair, unjust or arbitrary by the evolving standards of constitutional protection will be a violation of the right to life and the prohibition on cruel, inhuman and degrading treatment.

**The recent legal challenge to Singapore’s Misuse of Drugs Act was guided by developments against the mandatory death penalty for all crimes. What lessons can those working to abolish the death penalty for drugs learn from the jurisprudence developed by more general abolitionist actions?**

There have been some very significant developments concerning the constitutional prohibition on the mandatory death penalty around the world which have seen the judiciary adopt a dynamic interpretation to the fundamental rights provisions enshrined in the Constitution. A Court is asked to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in light of “evolving standards of decency” which mark the progress of a maturing society. The challenge to the application of the mandatory death penalty for drugs is based on the concept that the mandatory death penalty is a cruel and inhuman punishment and because it is arbitrary it also amounts to a

violation of the right to life.

There is now a whole body of case law from around the world which reflects the emerging recognition that the imposition of the mandatory death penalty is cruel and inhuman and amounts to an arbitrary deprivation of life including decisions from India, the United Kingdom, the US, Canada, the Caribbean and Africa. In Singapore, the 1981 decision *Ong Ah Chuan* rejected a challenge to a Singaporean statute which provided for the mandatory death penalty for all drug traffickers.<sup>1</sup> This has remained the law in Singapore notwithstanding the emerging case law since then which have consistently found this decision to be obsolete and incorrectly decided.

In the intervening years, there have been cases from Belize,<sup>2</sup> Jamaica,<sup>3</sup> Bahamas,<sup>4</sup> Malawi,<sup>5</sup> Uganda<sup>6</sup> and more recently Kenya<sup>7</sup> clearly confirming that the mandatory imposition of the death penalty is no longer consistent with the right to life and the prohibition on cruel and inhuman punishment. These cases challenge the mandatory death penalty for murder, but there is no logical reason why this body of jurisprudence cannot be extended and applied to drug offences. Moreover, the weight of international legal opinion clearly suggests that the death penalty is never appropriate for drug offences.

**Singapore has not ratified the International Covenant on Civil and Political Rights and the country's Court of Appeal has rejected the applicability of customary international law. Does this expose a weakness in arguing the 'most serious crimes' provision under the Covenant?**

The fact that Singapore has not ratified the Covenant should not necessarily hinder a successful argument on the 'most serious crimes provision' under the Covenant, as the argument can equally be made under customary international law.

Whether drug offences can qualify as being among the most serious of crimes for which the death penalty may be imposed is a question which has to be assessed by reference to the relevant norms of international law. Under international law, drug offences cannot be considered among the 'most serious of crimes' given that the United Nations Commission

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<sup>1</sup> *Ong Ah Chuan v. Public Prosecutor* [1981] AC 648.

<sup>2</sup> *Reyes v. The Queen*, [2002] 2 WLR 1034 (PC).

<sup>3</sup> *Lambert Watson v. The Queen*, [2004] UKPC 34.

<sup>4</sup> (1) *Forrester Bowe (Junior) (2) Trono Davis v. The Queen*, [2006] UKPC 10.

<sup>5</sup> *Kafantayeni v. Attorney General*, [2007] 40ILM 564.

<sup>6</sup> *Attorney General v. Susan Kigula and 417 Others*, No. 03 of 2006, Uganda: S. Ct (21 January 2009).

<sup>7</sup> *Godfrey Ngotho Mutiso v. Republic*, Criminal Appeal No.17 of 2008 Court of Appeal of Mombasa.

on Human Rights<sup>8</sup> and the UN Human Rights Committee<sup>9</sup> have determined that drug related offences fall outside the scope of the ‘most serious crimes’ for which the death penalty may be imposed. In fact, the Committee and the Commission have rejected nearly every imaginable category of offence other than murder as falling outside the ambit of the most serious of crimes.

The concept that the mandatory imposition of the death penalty violates the prohibition on ‘cruel and unusual punishment’ or ‘inhuman punishment’ is now universally accepted. No international human rights court in the last quarter of a century has held that the mandatory imposition of the death penalty is not ‘cruel and unusual punishment’ or ‘inhuman punishment’. On the contrary, the mandatory imposition of the death penalty has been held to constitute inhuman punishment by the Indian Supreme Court in the cases of *Bachan Singh* and *Mithu*, the US Supreme Court from *Woodson v North Carolina*, the Eastern Caribbean Court of Appeal in *Spence v Hughes*, the Privy Council in a succession of cases from *Reyes*, *Hughes* and *Fox* to *Watson* and *Bowe*, the Inter-American Court of Human Rights in the successive cases of *Boyce* and *Cadogan*, the Ugandan Supreme Court in *Kigula*, the High Court of Malawi in *Kafantayeni*, the Court of Appeal of Kenya in *Mutiso* and the United Nations in *Kennedy v Trinidad and Tobago*.

It is clearly established that the prohibition on cruel and inhuman treatment or punishment is a rule of customary international law. It is also now generally recognised that the mandatory death penalty violates the prohibition on cruel and inhuman treatment or punishment. In our view, the relevant provisions of the Misuse of Drugs Act as applied in Singapore result in grossly disproportionate penalties for the prescribed offences, and in the circumstances, it follows that the mandatory death penalty under the MDA violates the customary international law prohibition on cruel and inhuman treatment or punishment. There is an evolving and dynamic consensus that the mandatory death penalty is unlawful. The UN Economic and Social Council’s Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty, stipulates that the scope of the most serious crimes should not go beyond international crimes with lethal or extremely grave consequences.<sup>10</sup>

In 1996, Mr Bacre Waly Ndiaye, the then-Special Rapporteur on Extrajudicial Summary or

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8 UN Commission on Human Rights, ‘Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur’ (24 December 1996) UN Doc. No. E/CN.4/1997/60.

9 UN Human Rights Committee, ‘Concluding Observations: Thailand’ (8 July 2005) UN Doc. No. CCPR/CO/84/THA, para. 14.; UN Human Rights Committee, ‘Concluding Observations: Sudan’ (29 August 2007) UN Doc. No. CCPR/C/SDN/CO/3, para. 19.

10 Economic and Social Council of the United Nations, ‘Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty’ (25 May 1984) res. 1984/50.; UN General Assembly, ‘Human rights in the administration of justice’ (14 December 1984) UN Doc. No. A/RES/39/118.

Arbitrary Executions, submitted his report to the Commission on Human Rights in which he surveyed the above restrictions on the death penalty stating that ‘the death penalty should be eliminated for crimes such as economic crimes and drug-related offences’.<sup>11</sup>

Two recent cases (*Boyce et al* and *Cadogan*) from the Inter-American court of Human Rights indicate that the mandatory death penalty contravenes Articles 4(1) and 4(2) of the American Convention on Human Rights.

In 2004, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions found that the mandatory death penalty was incompatible with the prohibition of cruel, inhuman and degrading treatment or punishment.<sup>12</sup>

On 23 April 2009, Justice Richard Goldstone and Martin Šolc, the Co-Chairs of the International Bar Association’s Human Rights Institute wrote to Singapore’s Prime Minister Lee Hsien Loong on behalf of the Institute. In their letter, the Co-Chairs encourage Singapore ‘to ensure that the death penalty is not applied in contravention of international law, specifically that it is only applied for the most serious of crimes and is never a mandatory sentence.’<sup>13</sup>

Accordingly, in our view it has now become clearly and firmly established that the mandatory death penalty is unlawful and violates customary international law. In the circumstances, it is entirely appropriate and open for a Court to find that the mandatory imposition of the death penalty for an offence committed under the *Misuse of Drugs Act* is inconsistent with customary international law.

### **What other pressure points for opposing the death penalty for drugs are ripe to be explored or utilised?**

It must be assumed that the objective of having the mandatory death penalty in the *Misuse of Drugs Act* is to prevent drug trafficking through incapacitation of the specific offender and general deterrence of the public. In our view, there is something illogical in a scheme which imposes a mandatory death penalty for trafficking in excess of 15 grams of certain drugs, but not make available the death penalty for trafficking 14.99 grams of the same drug, even if it could be contended that there is a quantitative and incremental increase in guilt or

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<sup>11</sup> UN Commission on Human Rights, ‘Extrajudicial, summary or arbitrary executions – Report by the Special Rapporteur, Mr. Baore Waly Ndiaye’ (26 December 1996) UN Doc. No. E/CN.4/1997/60, para. 91.

<sup>12</sup> Human Rights Council, ‘Extrajudicial, summary or arbitrary executions – Report of the Special Rapporteur, Philip Alston’ (22 December 2004) UN Doc. No. E/CN.4/2005/7, para. 80.

<sup>13</sup> International Bar Association Human Rights Institute, ‘Singapore: call for abolition of the death penalty’, 23 April 2009.

social mischief associated with trafficking in the 15 gram level.

In relation to deterrence, there is no evidence to support the proposition that the mandatory death penalty for drug trafficking is an effective deterrent. There has been much international research on this issue and the deterrent effect of a mandatory death penalty for drug trafficking has not been established. As found by Zimring, Fagan and Johnson in their study 'Executions, Deterrence, and Homicide: A Tale of Two Cities',<sup>14</sup> Singapore has not reduced its crime rate when compared to the position in the comparable state of Hong Kong, which does not have the death penalty.

Furthermore, as Professor Jeffrey Fagan has testified in a number of cases, drug prices are higher in Indonesia compared to Singapore, despite the higher risk facing drug traffickers in Singapore. In his view, if execution was an effective deterrent for drug trafficking, then the necessity of executions should decline over time, yet Singapore continues to execute drug traffickers at high rates.

In addition, given the type of offender who is often persuaded to act as a courier in drug trafficking cases, there is a limited deterrent effect of the mandatory death penalty on such offenders who are young and poor. In fact, many academics have stated that there is no evidence of a statistical kind which has been forthcoming to support the contention that capital punishment deters drug crime in any of those jurisdictions that retain the death penalty on the books for drug offences. Comparisons of Indonesia, Malaysia and Singapore show that the rate of execution has no effect on the prices of drugs nor on the relative rates of drug preference. In reality, the threat of execution is a futile strategy to deter drug trafficking.<sup>15</sup>

**There was an identified tension in the *Yong Vui Kong* decision between the roles of the legislature and the judiciary – with the latter ultimately claiming that it was unwilling to influence the legislature. Is there a realistic concern that changes in the courts could inspire a legislative backlash?**

A common argument is that it is for legislature and not the courts to determine the appropriate penalty to be imposed for drug trafficking offences. But the essence of all constitutional protection is that, where fundamental human rights are engaged, the courts have a vital role to play in determining on a contemporary basis and in accordance with

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<sup>14</sup> Franklin E Zimring, Jeffrey Fagan & David T Johnson, 'Executions, Deterrence, and Homicide: A Tale of Two Cities', *Journal of Empirical Legal Studies*, vol. 7, issue 1, March 2010.

<sup>15</sup> *Yong Vui Kong v. Public Prosecutor*, Affidavit of Jeffrey Fagan (3 March 2010).

the “evolving standards of decency” doctrine, whether the laws passed by a parliamentary majority accord with the fundamental principles enshrined in the constitution.

The Courts have to operate as the ultimate protectors of fundamental human rights whilst showing respect for the decisions of the legislature. Legislative decisions are entitled to deference, however, the legislature should not be supreme when it comes to the application of penalties which conflict with fundamental human rights.

From our experience, there are concerns that judicial activism may create a legislative response particularly in countries that actively seek to retain and implement the death penalty. Our primary position is that the death penalty for drug offences is incompatible with international law as it does not meet the criteria of the “most serious crimes”. To retain the mandatory death penalty for such offences is pernicious and even more impermissible and the judiciary should intervene in this regard. The will of the legislature (if this is the issue) that drug-trafficking offences be severely punished and deterred can still be amply respected by a law that makes the possession of more than 15 grammes of diamorphine a death-eligible offence. The introduction of a judicial discretion to disapply the death penalty in the interests of justice in an individual case would constitute a limited safeguard against the obvious potential injustices of a wholly mandatory sentencing system. This would also recognise that the legislature has singled out offences of significant drug-trafficking involving 15 grammes or more of diamorphine as of sufficient gravity to merit the potential imposition of the death penalty.

**It is often suggested that Eurocentric principles developed by the Judicial Committee of the Privy Council in the landmark cases condemning the mandatory death penalty reflect a particular viewpoint that is inconsistent with the values of other countries throughout the world. How would you respond to this criticism?**

The first court to find that the mandatory imposition of the death penalty in the Caribbean was unconstitutional was in fact the Eastern Caribbean Court of Appeal, presided over by Sir Dennis Byron sitting with two Caribbean Judges. That court declined to follow the Privy Council’s earlier decisions in *Ong Ah Chuan* and *Runyowa* on the basis that ‘in the intervening twenty years between then and now [i.e. since *Ong*] the internationally accepted norms of humanity have evolved’. Most recently, the Government of Barbados has undertaken to abolish the mandatory death penalty on the basis that it breaches its international human rights obligations, and this year Guyana has gone one step further and passed legislation introducing discretion in capital cases.

The Inter-American Court of Human Rights has also condemned the mandatory imposition of the death penalty.<sup>16</sup> The court is composed of judges from North, South and Central America and the Caribbean who have condemned the mandatory imposition of the death penalty even in the worst cases of murder. In addition, the UN Human Rights Committee has found that the mandatory death penalty breaches the Covenant on Civil and Political Rights.<sup>17</sup>

In Commonwealth Africa too, courts in recent years have increasingly struck down the mandatory death penalty as unconstitutional. In so doing, they have relied on the growing global consensus that such a penalty is arbitrary and disproportionate, and have drawn support from decisions of the Indian Supreme Court, the US Supreme Court, the Human Rights Committee, the Inter-American Court, the Inter-American Commission and the Privy Council. It is notable that the governments of Uganda, Malawi and Kenya have accepted the decisions of their respective constitutional courts on the basis that they reflect the evolving standards of decency and constitutional imperatives for the protection of human rights.

Moreover, Constitutional courts in the Caribbean were not the first to condemn the mandatory death penalty as it was the Indian Supreme Court and the US Supreme Court, that led the way. Nor is the Privy Council the last court to have approved this fundamental principle. See for example the Ugandan Supreme Court, the Malawi High Court, the Court of Appeal of Kenya and the Mauritian Supreme Court whose decisions have recognised and reflected a massive development throughout the Commonwealth and the world. Far from being based on Eurocentric principles of justice, this development flows from the increasing recognition that the mandatory imposition of the death penalty for any offences, let alone for drug-trafficking, fails to accord a defendant the precious right to put forward mitigation to a judge before the death sentence is imposed. Even in China, Taiwan and Indonesia, the death penalty is discretionary.

**The Singapore Constitution it is said allows for flexibility by the operation of clemency, giving the opportunity for a mandatory sentence to be reduced by the executive. Is this a sufficient safeguard?**

The pardon process is no substitute for the existence of a judicial discretion as to whether

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<sup>16</sup> *Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago*, Inter-American Court of Human Rights Series C No. 94, 21 June 2002. ; Boyce [2003] 1 AC 400 *Cadogan v. Baldo* judgement of the Inter-American Court of Human Rights, 24 September 2009.

<sup>17</sup> UN Human Rights Committee, *Kennedy v. Trinidad and Tobago* (26 March 2002) UN Doc. No. CCPR/C/74/D/845/1998, para. 7.3.; UN Human Rights Committee, *Thompson v. Saint Vincent and the Grenadines* (18 October 2000) UN Doc. No. CCPR/C/70/D/806/1998, para. 8; UN Human Rights Committee, *Lubuto v. Zambia* Communication (1995) UN Doc. No. CCPR/C/55/D/390/1990/Rev.1.

to impose the death penalty. The decision as to whether the death penalty is appropriate should be taken by judges before the death penalty is imposed and not by the executive afterwards. That is a fundamental matter of due process and it is a necessary corollary of the principle of the separation of powers.

Due process and natural justice require that no penalty should be imposed without the opportunity to put forward mitigation. Even a shoplifter facing a short sentence of imprisonment is afforded an opportunity to put forward mitigation before the judge sentences him or her to a term of imprisonment. It is illogical and unjust that the most severe penalty of death can be imposed on a drug trafficker without any opportunity at all for him or her to put forward mitigation to the judge who is to pass sentence.

Surely, the greater the penalty, the greater the need for due process and fairness. This is acutely so, where the penalty to be imposed, unlike any other penalty, is final and irreversible.



COMMENTARY

# **Children Who Use Drugs: The Need for More Clarity on State Obligations in International Law**

*Damon Barrett\* and Philip E. Veerman\*\**

## **ABSTRACT**

Drug use among children has two systems of international law that may be brought to bear to ensure that States take measures to protect children from drug related harms. Neither, however, appears to have been adequately applied to the issue. This commentary raises a number of questions related specifically to the UN drug conventions and the UN Convention on the Rights of the Child (CRC). Broadly – how ‘up to date’ are the UN drug control conventions in the 21st century, and in the light of drug use among children? How does the CRC (coming from the different tradition of international human rights conventions) fit in? What does the CRC add, including via its various other interconnected provisions? Finally, what is the relationship between these two branches of international law?

## **Introduction**

Drug use among children and young people, including young children, has in recent decades become an increasing and global phenomenon. It is one which has, potentially, two systems of international law that may be brought to bear to ensure that States take measures to protect children from drug related harms. Neither, however, appears to have been adequately applied to the issue.

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The 1961 Single Convention on Narcotic Drugs<sup>1</sup> is fifty years old this year. It codified treaties that were much older, dating back to 1912.<sup>2</sup> It was drafted during the 1940s and 1950s, reflecting the views and experiences of the time (as well as State interests at the time). The 1971 Convention on Psychotropic Substances is forty years old this year.<sup>3</sup> The 1988 Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances is a youthful twenty-three.<sup>4</sup> The UN Convention on the Rights of the Child, meanwhile, is turning twenty-two. In all of their decades of existence there has been little in the way of analysis of international obligations towards drug using children, be they recreational users or those who have drug dependence problems.<sup>5</sup>

In the compartmentalised United Nations system,<sup>6</sup> the only human rights treaty that takes into account drugs is the UN Convention on the Rights of the Child, which was adopted in 1989.<sup>7</sup> Article 33 requires that

*States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties and to prevent the use of children in the illicit production and trafficking of such substances.*

For the most part, the focus has been on primary prevention (i.e. stopping children initiating drug use), focusing on article 38(1) of the 1961 Single Convention<sup>8</sup> and article 33 of the CRC.<sup>9</sup> However, since these articles were drafted we have learned to distinguish between programmes aimed at universal prevention (everyone in the population), selected programmes (members of at risk groups) and programmes for identified target populations ('at risk' individuals).<sup>10</sup>

While prevention is clearly an obligation on States parties to the Convention on the Rights of the Child and the drug conventions, it is irrelevant for children and young people

1 Single Convention on Narcotic Drugs 1961 (as amended by the 1972 Protocol) (30 March 1961), UNTS vol. 520 no. 7515. [hereinafter '1961 Convention'].

2 International Opium Convention (23 January 1912) LNTS vol. 8 (1922), p. 197.

3 1971 Convention on Psychotropic Substances (21 February 1971) UNTS vol. 1019 no. 14956. [hereinafter '1971 Convention'].

4 UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988) UNTS vol. 1582 no. 27627. [hereinafter '1988 Convention']

5 A notable exception is Sofia Gruskin, Karen Plafker and Alison Smith-Estelle, 'Understanding and Responding to Youth Substance Use: The Contribution of a Health and Human Rights Framework', *American Journal of Public Health*, December 2001, vol. 91, no. 12, pp. 1954–1963.

6 Damon Barrett and Manfred Nowak, 'The United Nations and Drug Policy: Towards a Human Rights Based Approach' in *The Diversity of International Law, Essays in Honour of Professor Kalliopi K. Koufa*, eds. A Constantinides and N Zaikos, Brill/Martinus Nijhoff, Leiden, 2009.

7 Convention on the Rights of the Child (20 November 1989) UNTS 1577, p.3. [hereinafter 'CRC']

8 'The Parties shall give special attention to and take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved and shall co-ordinate their efforts to these ends'; 1961 Convention (n 1) art. 38(1).

9 Article 33, however, is not limited to prevention, but is often equated with it. We explore this further below.

10 K. W. Griffin and G. J. Botvin, 'Evidence-Based Interventions for Preventing Substance Use Disorders in Adolescents', *Child and Adolescent Psychiatric Clinics of North America*, 2010, vol. 19, no. 3, pp. 505–526.

who currently use drugs. Access to treatment for children and adolescents who are drug dependent was not foremost in the minds of the drafters of the CRC, because it apparently did not fit with their image of childhood.<sup>11</sup> Under the terms of the Convention, a child was now, in international law, not only an object to be protected with prevention measures but also a subject of rights. That a child could also be using drugs or dependent on them, and also a subject of rights, was perhaps a bridge too far for the drafters.

Although not explicitly included in article 33 of the Convention on the Rights of the Child, it can be relatively easily argued that the right to treatment is nevertheless an obligation in protecting the child from the illicit use of narcotic drugs and psychotropic substances. If a child is already using drugs, what is needed to protect them? This raises at least two questions: What are the obligations of States in this respect (and what would child rights based treatment look like)?; and what about the majority of young people who are experimenting with drugs or use drugs recreationally, and are not in need of treatment?

Drugs and children is an area requiring detailed study across a range of disciplines such as drug treatment, harm reduction, education, juvenile justice and, indeed, in relation to children involved in drug production and trafficking. The intention of this commentary is not to provide an overview of drug use among children and young people, as this information and discussions around data gaps and data collection methodologies are available elsewhere.<sup>12</sup> Instead, it aims to raise a number of questions related specifically to the drug conventions and the Convention on the Rights of the Child that require further study. In particular, how do the UN drug conventions apply to 21<sup>st</sup> century drug using children? How does the Convention on the Rights of the Child apply to them? And what is the relationship between these two branches of international law?

### **Dated provisions – the need for a fresh look at children and drug use in international law**

The four international treaties that form that basis of this commentary are all now decades old. Over that period, much has changed in relation to trends and patterns of drug use and drug dependence among children and young people. Added to this are decades of addictions research, scientific discoveries, research into recreational drug use and experience in drug education, harm reduction and dependence treatment. HIV/AIDS did not exist in 1961 or 1971. Nor did hepatitis C. Injecting drug use was not as prevalent at that time as it is today. Many drugs now used by children and young people did not exist in 1988. Far fewer children and young people were using drugs, and drugs had not become such a visible aspect of adolescents' lives. Today's world for children is very different in myriad ways. When the

<sup>11</sup> Philip E. Veerman, *The Rights of the Child and the Changing Image of Childhood*, Martinus Nijhoff, Dordrecht, 1992.

<sup>12</sup> See, for example, United Nations Office on Drugs and Crime, *World Drug Report 2009*, Vienna, 2009.

Convention on the Rights of the Child was adopted, the internet was still an experiment. Today various 'legal highs' may be purchased online. For the most part, however, the drug conventions and the Convention on the Rights of the Child remain stuck in the past, due to a lack of analysis of their meaning for children and young people who use drugs in the 21<sup>st</sup> Century.<sup>13</sup>

### *Children in the international drug conventions*

A closer look at the texts of the drug conventions shows just how little of a focus there was on children during the drafting processes.<sup>14</sup> Only one of the three drug conventions specifically refers to children - the 1988 Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which contains two mentions.<sup>15</sup> Neither paragraph refers to measures to address drug use among children. Instead, the provisions are indicative of the 'protection of children' as justification in drug law and policy making, while the rights and specific needs of children have been overlooked.<sup>16</sup>

In its preamble, the 1988 Convention expresses the drafters' deep concern about 'the fact that children are used in many parts of the world as an illicit drug consumers market and for purposes of illicit production, distribution and trade in narcotic drugs and psychotropic substances, which entails a danger of incalculable gravity'.<sup>17</sup> As a preambular paragraph with no legally binding status, this is merely a statement of concern. However, the role of the child in providing moral justification for the provisions that follow is clear. It should be borne in mind that because of the efforts of the drafters to deliver a blow to drug trafficking, this agreement became the most prescriptive and punitive of the three drug conventions.<sup>18</sup>

Article 3(5) of the same treaty, meanwhile, requires that,

*The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the*

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<sup>13</sup> See Philip E. Veerman, 'The ageing of the Convention on the Rights of the Child', *International Journal of Children's Rights*, vol. 18, no. 4, 2010, pp. 585–618.

<sup>14</sup> See generally, W. B. McAllister, *Drug diplomacy in the twentieth century: an international history*, Routledge, New York, 2000.

<sup>15</sup> There are no mentions in any of adolescent, young people, youth or other terms. 'Minor' also appears once in the 1988 convention and is quoted here.

<sup>16</sup> See Damon Barrett (ed), *Children of the drug war: Perspectives on the impact of drug policies on young people*, New York, International Debate Education Association, iDebate Press, forthcoming 2011.

<sup>17</sup> 1988 Convention (n 4).

<sup>18</sup> For an overview see Damon Barrett, Rick Lines, Rebecca Schleifer, Richard Elliott and David Bewley-Taylor, 'Recalibrating the Regime: The need for a human rights based approach to international drug policy', Beckley Foundation and International Harm Reduction Association, London, March 2008, pp. 18–19.

*commission of the offences established in accordance with paragraph 1<sup>19</sup> of this article particularly serious, such as:*

...

*(f) The victimization or use of minors;*

*(g) The fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities*

Sub-paragraph (f) refers to the involvement of minors in the production or trafficking in drugs, while sub-paragraph (g) is related to prevention, aiming to deter sales to children. Again, there is no reference made to the situation of children who are in fact using drugs. The official commentary on the treaty sheds little further light.<sup>20</sup>

The fact that these are the only specific mentions of children in the drug treaties does not mean that their provisions do not apply to children. The question is *how* their provisions so apply. This is crucial given the ways in which the drug conventions have been used to justify draconian measures,<sup>21</sup> and the specific permission in the conventions, without explicit human rights safeguards, for States parties to take measures that are ‘more strict or severe’ than those described in the treaty itself.<sup>22</sup>

It must be borne in mind that the needs and rights of people who use drugs or are dependent on drugs were not a focus in the drafting of the drug conventions.<sup>23</sup> Regardless of age, the drug control conventions contain only limited provisions on treatment and

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<sup>19</sup> ‘Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

a) i) The production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;  
 ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;  
 iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in i) above;  
 iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;  
 v) The organization, management or financing of any of the offences enumerated in i), ii), iii) or iv) above;’  
 1988 Convention (n 4) para. 3(i).

<sup>20</sup> *Commentary on the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*, United Nations, Vienna, 20 December 1988, pp. 15, 92, 93.

<sup>21</sup> In 2007, the Constitutional Court of Indonesia used the wording of the 1988 Convention to equate drug trafficking to crimes against humanity and therefore to justify the death penalty for drug offences. Edith Yunita Sianturi, Rani Andriani (Melisa Aprilia), Myuran Sukumaran, Andrew Chan, Scott Anthony Rush 2-3/PUU-V/2007 [2007] IDCC 16 (30 October 2007) pp. 100–101.

<sup>22</sup> 1961 Convention (n 1) art. 39.; 1971 Convention (n 3) art. 23.; 1988 Convention (n 4) art. 24.

<sup>23</sup> McAllister (n 14) p. 5.

general requirements relating to prevention.<sup>24</sup> As noted by one commentator, '[T]he Single Convention of 1961 built on a trend of requiring Parties to develop increasingly punitive domestic criminal legislation' and that this 'prohibition focus of the Convention was emphasized by the minimal attention paid to the drug abuse problem'.<sup>25</sup>

According to article 38(1) of the 1961 Convention, States parties must take 'all practical measures' to prevent drug use and to realise the 'early identification, treatment, education, after-care, rehabilitation and social reintegration of persons involved'. However, in article 38(2) ('adequate facilities for effective treatment'), the Single Convention leaves it to the States parties themselves to develop how this treatment will be realised. These general terms are replicated word for word in article 20 of the 1971 Convention. But what would this obligation entail for children? In this respect, given the very general nature of the obligations towards people who use drugs in the drug conventions, the obligations under the Convention on the Rights of the Child, and the normative guidance from related human rights jurisprudence, are more helpful.

### *Drugs in the Convention on the Rights of the Child*

The compartmentalisation of the United Nations is evident when it comes to the issue of human rights and drugs. In this context, it is interesting that neither the discussions at the Plenipotentiary Conference on Drug Abuse and Illicit Trafficking in Drugs in Vienna in 1987<sup>26</sup> nor the 1988 UN General Assembly Special Session on Drugs<sup>27</sup> in New York were picked up in the meeting rooms of the Palais des Nations in Geneva during the drafting of the Convention on the Rights of the Child.

Drugs are explicitly mentioned only once in the Convention on the Rights of the Child. This inclusion was proposed initially by China in 1984 as an aspect of the right to health.<sup>28</sup> This is in itself unusual. The use of alcohol, which is a large problem among young people, did not make it into the Convention. The Convention is in fact the only core UN human rights treaty to specifically refer to drug use and the drug trade.<sup>29</sup>

24 The UN Office on Drugs and Crime and the World Health Organization, among many others working professionally in the field, have developed guidance on these issues. We do not set them out here, however, as they are not focused on international legal obligations under the drug conventions or the Convention on the Rights of the Child.

25 Jay Sinha, 'The History and Development of the Leading Drug Control Conventions', Prepared For The Senate Special Committee On Illegal Drugs, Parliamentary Research Branch, Ottawa, 2001.

26 UN Department of Public Information, *Yearbook of the United Nations 1987*, Martinus Nijhoff, Dordrecht, 1992, chap. XXI.

27 United Nations General Assembly '20th Special Session, *Official Records*, 8-10 June 1998' UN Doc. No. A/S.20/PV.1-9.

28 The original formulation of the article, submitted by China in 1984, though not discussed due to lack of time, was "preventing and prohibiting the child from using drugs" discussed in the context of then article 12 on the right to health. In 1986 China suggested a new article "The States Parties to the present Convention shall take measures to prevent and prohibit children from taking drugs". United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, New York and Geneva, 2007, pp. 709 - 710.

29 See also Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO No. 182), 2133 U.N.T.S.161, entered into force Nov. 19, 2000, art. 3(e); and African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, art. 28.

By placing the issue of drugs within the Convention, article 33 situates drug control, as it relates to children and young people, within a complex human rights framework. But as a provision of international law it has received little attention. It has appeared rarely in academic literature, and never (to date) has a study specifically analysed its content in detail.<sup>30</sup>

Within drug policy discussions, some tend to place article 33 alongside the drug conventions, as if it were part of the same system of control (an unusual role for a human rights treaty).<sup>31</sup> The International Narcotics Control Board, the independent treaty body for the drug conventions, refers to the article on rare occasions but equates it with prevention.<sup>32</sup> With the exception of some notable Concluding Observations, the Committee on the Rights of the Child has also failed to give proper focus to either the article itself or the phenomenon of drug use and dependence among children. Following a near absence of early commentaries on article 33,<sup>33</sup> the Committee now pays the provision greater attention. However, its Concluding Observations relating to drug use have typically been inconsistent. For the most part, the Committee's recommendations are very general, and frequently amount to mere restatements of article 33 itself.<sup>34</sup>

The Committee's General Comments do provide some useful guidance, the Comment on HIV/AIDS being the most useful among them in this context.<sup>35</sup> In it, the Committee drew attention to HIV prevention related to injecting drug use among children and young people, stating that

*Injecting practices using unsterilized instruments further increase the risk of HIV transmission. The Committee notes that greater understanding of substance use behaviours among children is needed, including the impact that neglect and violation of the rights of the child has on these behaviours. In most countries, children have not benefited from pragmatic HIV prevention programmes related to*

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30 A commentary on the article by the authors is forthcoming. See also Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff, The Hague, 1999.

31 See, for example, 'Declaration of the World Federation Against Drugs', 2008.

32 See, for example, International Narcotics Control Board, *Report of the International Narcotics Control Board for 2008*, UN Doc. No. E/INCB/2008/1, 2009, para. 35.

33 With some exceptions. See, for example, Committee on the Rights of the Child, 'Concluding Observations: Maldives' (25 May 1998) UN Doc. No. CRC/C/79/1998, para. 239.; Committee on the Rights of the Child, 'Concluding Observations: South Africa' (22 February 2000) UN Doc. No. CRC/C/15/Add.122, para. 38.

34 See for, example the, Committee on the Rights of the Child, 'Concluding Observations: Georgia' (28 June 2000) UN Doc No CRC/C/15/ADD.124, para. 65.; Committee on the Rights of the Child, 'Concluding Observations: Surinam' (28 June 2000) UN Doc. No. CRC/C/15/ADD.130, para. 56.; Committee on the Rights of the Child, 'Concluding Observations: South Africa' (23 February 2000) UN Doc. No. CRC/C/15/ADD.122, para. 38.; Committee on the Rights of the Child, 'Concluding Observations: Grenada' (28 February 2000) UN Doc. No. CRC/C/15/ADD.121, para. 27. All state, 'In the light of article 33 of the Convention, the Committee recommends that the State party take all appropriate measures, including administrative, social and educational measures, to protect children from the illicit use of alcohol, narcotic drugs and psychotropic substances and to prevent the use of children in the illicit production and trafficking of such substances', adding general recommendations on rehabilitation and co-operation with international agencies.

35 Committee on the Rights of the Child, 'General Comment No. 3: HIV/AIDS and the Rights of the Child' (17 March 2003) UN Doc. No. CRC/GC/2003/1.

*substance use, which even when they do exist have largely targeted adults.*<sup>36</sup>

The Committee went on to provide some brief normative guidance.

*The Committee wishes to emphasize that policies and programmes aimed at reducing substance use and HIV transmission must recognize the particular sensitivities and lifestyles of children, including adolescents, in the context of HIV/AIDS prevention. Consistent with the rights of children under articles 33 and 24 of the Convention, States parties are obligated to ensure the implementation of programmes which aim to reduce the factors that expose children to the use of substances, as well as those that provide treatment and support to children who are abusing substances.*<sup>37</sup>

The Committee's most detailed and forthright Concluding Observation on this issue arose out of the periodic review of Ukraine in February 2011. The Committee expressed its deep concern 'at the increasing practice of drug injection among children, affecting in particular children in prison, children left behind by migrating parents, children in street situations, and that drug use constitutes a main reason for HIV infection', the 'lack of specialized youth-friendly services aimed at treatment and rehabilitation for these at-risk children' and the 'legal and attitudinal barriers' that impede access to such services. It went on to recommend the development of 'specialised and youth-friendly drug dependence treatment and harm reduction services for children and young people' and the amendment of 'laws that criminalise children for possession or use of drugs'.<sup>38</sup>

Connecting article 33 to article 24 in General Comment No. 3, the Committee clearly emphasises that drug use among children is a (public) health matter, not one of criminal law enforcement. This is consistent with the Committee's various Concluding Observations which require that children who are drug dependent be seen as victims and not criminals.<sup>39</sup> But even this 'victim' status is misleading. The Committee has yet to properly consider the issue of recreational drug use, which constitutes the majority of drug use among children and young people. Bearing in mind the evolving capacities principle within the Convention, always seeing the young drug user as a 'victim' fails to acknowledge the reality on the ground for many.

Some children may commit criminal acts, such as drug related acquisitive crime. Buying and possessing controlled drugs may be a crime, but should we brand someone a 'criminal'

<sup>36</sup> *ibid*, para. 39.

<sup>37</sup> *ibid*.

<sup>38</sup> Committee on the Rights of the Child, 'Concluding Observations: Ukraine' (3 February 2011) UN Doc. No. CRC/C/UKR/CO/4, paras. 59–60.

<sup>39</sup> See for example, Committee on the Rights of the Child, 'Concluding Observations: Denmark' (23 November 2005) UN Doc. No. CRC/C/DNK/CO/3, para 55.; Committee on the Rights of the Child, 'Concluding Observations: Indonesia' (26 February 2004) UN Doc. No. CRC/C/15/Add. 223, para. 74.

for doing so? Some may be victims of neglect or exploitation, or suffering from drug dependence. Young children may be at particular risk. On the other hand, many young people are experimenting with drugs as an increasingly common aspect of adolescence. Are they ‘victims’? Most young people who use drugs fall into neither (overly general) category.

### **Towards a contemporary view – a child rights interpretation of the drug conventions**

#### *The relationship between the drug conventions and the Convention on the Rights of the Child*

The lack of attention to article 33 is especially unusual from an international law perspective, as the article appears to directly refer to the international drug conventions. The relationship between the two branches of international law is therefore important and requires elaboration.

The first question that must be answered is whether the three international drug conventions are, indeed, ‘relevant international treaties’ for the purposes of article 33. The question is simply answered in the affirmative. During the drafting process, the World Health Organization explicitly stated that the relevant international treaties were the 1961 Single Convention and the 1971 Psychotropics Convention.<sup>40</sup> These treaties schedule hundreds of ‘narcotic drugs and psychotropic substances’ for the purposes of article 33.<sup>41</sup>

These two treaties clearly qualify. The 1988 Convention had not been adopted when the CRC was being drafted, however, and the draft of the 1988 Convention was also never referred to, so the situation in this regard is not so clear cut. The 1988 Convention schedules precursor chemicals rather than narcotic drugs and psychotropic substances, although some such chemicals are also consumed.<sup>42</sup> It would appear to make sense that the 1988 Convention is now also a relevant international treaty, despite its adoption in the years after the drafting process (but just prior to the adoption of the CRC). Its inclusion in article 33 requires the recognition that the Convention on the Rights of the Child is open to changes in the international framework of drug control, through the creation of new treaties and through older ones being superseded. This is consistent with the wording which does not refer to any individual treaty explicitly.

The second question is what is the role of the drug conventions, as relevant international treaties, within article 33? Looking at the provision, there are two potential roles for the drug

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40 This was already in the period of the technical review of the Convention on the Rights of the Child in 1989, when the Working Group determined which recommendations to accept. See UN Doc. No. E/CN.4/1989/WG.1/CRP.1, p. 37). See also, *Legislative History of the Convention on the Rights of the Child* (n 28) pp.709–712.

41 For the lists of scheduled substances see (narcotic drugs) [http://www.incb.org/pdf/forms/yellow\\_list/48thedYL\\_Dec\\_08E.pdf](http://www.incb.org/pdf/forms/yellow_list/48thedYL_Dec_08E.pdf); and (psychotropic substances) <http://www.incb.org/pdf/e/list/green.pdf> (accessed 10 January 2011).

42 The full list is available at <http://www.incb.org/pdf/e/list/red.pdf> (accessed 10 January 2011).

conventions. The first is *normative* and indicates that the drug conventions set out the kinds of measures envisaged by the Convention on the Rights of the Child in order to protect children from drugs. Such a reading would be as follows:

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties and to prevent the use of children in the illicit production and trafficking of such substances.

The second role may be termed *subjective* - identifying the subject matter from which the child should be protected. Here the drug conventions are the reference point for the substances that are being referred to, and what qualifies as an 'illicit use' of those substances. That reading would be:

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties and to prevent the use of children in the illicit production and trafficking of such substances.

The latter reading is clearly the more logical in the context of the Convention on the Rights of the Child. Indeed, the former reading would have had the effect of binding States parties to the CRC to measures in unidentified drug treaties to which they may not have been parties. There remain today a number of States parties to the Convention on the Rights of the Child that have not yet ratified the one or more of the drug conventions.

This is an important clarification. It means that the provisions of the drug conventions are not the sole reference point for what are the 'appropriate measures' being referred to in article 33. This interpretation is supported by the fact that the Framework Convention on Tobacco Control<sup>43</sup> may now also be a 'relevant international treaty' under the terms of article 33. As the 1988 Convention demonstrates, the Convention on the Rights of the Child is open to the inclusion of new international instruments. This is supported by article 41 of the Convention on the Rights of the Child, which refers to other instruments of international law more conducive to the realisation of the rights of the child, and which envisages new agreements arising. At the time of drafting the Convention there was no international treaty on tobacco. However, since that time the Framework Convention has been adopted and has

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43 'Framework Convention on Tobacco Control' (21 May 2003) Adopted unanimously by the 56th World Health, resolution 56.1.

amassed 172 States parties.<sup>44</sup>

It would appear that, like the 1988 drug convention, the Framework Convention is today a 'relevant international treaty' for the purposes of article 33, especially as it contains specific reference to the Convention on the Rights of the Child in its preamble. While this means tobacco is equated with other dangerous drugs in article 33, it is not controlled under the Framework Convention in the same way as those drugs scheduled under the 1961, 1971 and 1988 drug treaties. Rather, the Framework Convention adopts a public health-based approach to tobacco control, and does not prohibit its sale, transport or possession. Instead, the Framework Convention imposes a system of legal regulation and control with specific protections for children (or 'minors').

This illustrates that the framework of the drug conventions does not represent the only way to protect children from harmful drugs, but rather reflects the current international consensus around specific substances. As such, no specific paradigmatic approach to drugs adopted in other treaties is explicitly enshrined in the Convention on the Rights of the Child, which is appropriate, as it leaves room for changes to the international drug control framework and developing scientific evidence. Indeed, the Convention on the Rights of the Child does not appear to preclude a move away from the current prohibitionist paradigm entirely, and towards one of legal regulation and control. If the three drug treaties were to be replaced in future by a new system of legal regulation and control of currently illicit drugs, then any new treaties adopted would replace the old ones as the 'relevant international treaties', with the drugs under international control and the concept of 'illicit use' developing concurrently. What would not change is the over-riding paradigm of child rights.

### *Introducing a child's rights approach to the interpretation of the drug conventions*

The drug treaties and the Convention on the Rights of the Child operate concurrently, not in a vacuum from each other.<sup>45</sup> The drug conventions represent the current consensus on the broad controls to be adopted over certain substances, are binding of themselves and enjoy near universal ratification. This has relevance for the reading of article 33. But the drug conventions are not self-executing and many of their provisions are very broad. Some issues of relevance to children and drug use are not covered. In addition, each of the drug conventions permits States parties to take measures more strict or severe than those described within the relevant instrument.

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<sup>44</sup> World Health Organization, 'Parties to the WHO Framework Convention on Tobacco Control' [http://www.who.int/fctc/signatories\\_parties/en/index.html](http://www.who.int/fctc/signatories_parties/en/index.html) (accessed 10 December 2010).

<sup>45</sup> International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi' (13 April 2006) UN Doc. No. A/CN.4/L.682, para. 120.

When it comes to children and young people who use drugs, the Convention on the Rights of the Child must be considered *lex specialis* for determining what are ‘appropriate measures’. This requires an interpretation of the drug conventions in line with concurrent CRC obligations. This is consistent with the role of international human rights law as a check and balance against state law and policy, the status of human rights in the UN Charter (articles 1 and 55), and the fact that the Convention on the Rights of the Child contains *jus cogens* norms such as freedom from torture. The alternative would mean that child rights must be read so as to comply with drug control obligations, which would appear wholly contrary to the human rights framework. It would seem to be the case, therefore, that in the relationship between the children’s right convention and the drug conventions, the role of the Convention on the Rights of the Child is considerably stronger.<sup>46</sup>

Below are three examples whereby provisions or aspects of the drug conventions relating to drug use must be read in the light of the Convention on the Rights of the Child.

*Drug dependence treatment* - As noted above, articles 38 of the 1961 Convention and 20 of the 1971 Convention require States parties to put in place drug dependence treatment for those in need.<sup>47</sup> If this obligation is to have relevance to children, and if their rights are to be respected, protected and fulfilled, it must be read in the light of the Convention on the Rights of the Child.

Early efforts of treatment of adolescents relied on adult models.<sup>48</sup> In this field some modest progress can be reported.<sup>49</sup> But as stated by Trivedi, in a statement intended for a North American audience but which might also be valid for other parts of the world, ‘What is most amazing about the issue of substance abuse in kids is how little is done, at the level of training programs as well as in treatment programs, to help diagnose and treat this population...The remarkable lack of appropriate treatment programs...is shocking.’<sup>50</sup>

The Convention on the Rights of the Child imposes both positive and negative obligations on States parties. Looking at positive obligations, for example, article 24 (the right to health) would require that any such treatment measures be available, accessible, acceptable

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46 It could be argued that the drug conventions are ‘more conducive to the realization of the rights of the child’ for the purposes of article 41 of the Convention on the Rights of the Child. However, this seems a difficult case to make given the sheer absence of human rights norms within the drug conventions and the lack of attention to children and young people.

47 The then outgoing Executive Director of the UN Office on Drugs and Crime, Antonio Maria Costa, stressed this in his foreword to the *World Drug Report 2010*. See UN Office on Drugs and Crime, *World Drug Report 2010*, UN Office On Drugs and Crime, Vienna, p. 4.

48 Randolph Muck, Kristin A. Zempolich, Janet C. Titus, Marc Fishman, Mark D. Godley and Robert Schwebel, ‘An Overview of the Effectiveness of Adolescent Substance Abuse Treatment Models’, *Youth and Society*, 2001; M. L. Dennis, et al., ‘The Need for Developing Adolescent Treatment Models’ in *Adolescent Substance Abuse Treatment in the United States: Exemplary Models from a National Evaluation Study*, eds. S. J. Stevens and A. R. Morral, Hawthorn Press, New York, 2003.

49 Yifrah Kaminer, ‘Alcohol and Drug Abuse: Adolescent Substance Abuse Treatment: Where Do We Go From Here?’, *Psychiatric Services*, vol. 52, 2001, pp. 147–149.

50 H. K. Trivedi, ‘The Elephant in the Room’, *Child and Adolescent Psychiatric Clinics of North America*, vol. 19, no. 3, 2010, pp. xiii–xiv.

and of sufficient quality.<sup>51</sup> This, in turn, would demand that they be suited to the specific needs of children and young people and based on scientific evidence and best practice. Moreover, drug dependence does not often exist in isolation from other issues, including mental health (co-morbidity). The CRC's emphasis on the child's sense of dignity and worth offers a framework for comprehensive child policy in a manner that is consistent with the promotion of mental health.<sup>52</sup>

When engaging the negative obligations, the treatment must not result in abuses of the rights of the child. This should go without saying, but there are in fact many examples of children being abused in the name of drug treatment, being detained arbitrarily, forced to work and subjected to various forms of cruel inhuman and degrading treatment.<sup>53</sup> These measures would of course violate numerous articles in the CRC, but are not necessarily prohibited by the drug treaties if read in isolation due to the absence of human rights norms within their provisions. Article 25 (child's right to periodic review of treatment<sup>54</sup>) aims to address this type of situation by preventing the continuation of an undesired situation, while article 37 (reflecting a norm of *jus cogens*) strictly prohibits torture or cruel inhuman or degrading treatment or punishment.

*Harm reduction* - Harm reduction is an area of practice, science and policy that has been proven to reduce the health and social harms of drug use. However, harm reduction has until recently received little attention in international law, or in the recommendations of the Committee on the Rights of the Child (as it relates to children and young people).

Both the drug conventions and the children's rights convention are silent on harm reduction.<sup>55</sup> This is inevitable, as harm reduction as policy and practice has really only emerged in the last two decades, mostly in the field of HIV prevention.

Whether harm reduction is permitted under the drug conventions remains contested, albeit by a small minority.<sup>56</sup> The International Narcotics Control Board weakly supports aspects of harm reduction such as needle and syringe exchange and opioid substitution therapy,<sup>57</sup> but

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51 UN Committee on Economic Social and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc. No. E/C.12/2000/4, para. 12.

52 Gary B. Melton, 'In Search of the Highest Attainable Standard of Mental Health for Children,' *Child Welfare*, vol. 89, no.5, 2010.

53 See, for example, Human Rights Watch, *Skin on the Cable: The Illegal Arrest, Arbitrary Detention and Torture of People Who Use Drugs in Cambodia*, Human Rights Watch, New York, 2010.

54 Which itself should now be read in conjunction with the 'Principles for the protection of persons with mental illness and the improvement of mental health care' adopted by the General Assembly, 17 December 1991, UN Doc. No. GA/RES/46/119.

55 'Harm Reduction' refers to policies, programmes and practices that aim primarily to reduce the adverse health, social and economic consequences of the use of licit and illicit psychoactive drugs without necessarily requiring cessation. The harm reduction approach to drugs is based on a strong commitment to public health and human rights.

56 See Alison Crocket, 'The Function and Relevance of the Commission in Narcotic Drugs in the pursuit of Humane Drug Policy (or the ramblings of a bewildered diplomat)', *International Journal on Human Rights and Drug Policy*, vol. 1, 2010, pp. 81–88.

57 See, for example, International Narcotics Control Board, *Report of the International Narcotics Control Board for 1993*, UN Doc. No. E/INCB/1993/I, chap. 1.

is antagonistic towards others such as safer crack kits and safe consumption rooms.<sup>58</sup> The Board considers the latter two to be in breach the drug conventions, although there is little in the way of legal argument to support this.<sup>59</sup>

Russia claims that opioid substitution therapy is not permitted under the drug conventions, and has banned such treatment until 2020. Medical uses of controlled drugs, however, are not only permitted but protected under the drug conventions. The best that can be said is that harm reduction is discretionary under the drug conventions. Banning harm reduction is not prohibited.

Conversely, that harm reduction is now a recognised requirement of the right to health of people who use drugs is clear. This has been supported by the current and former Special Rapporteurs on the right to health,<sup>60</sup> by the Human Rights Council<sup>61</sup> and consistently by the UN Committee on Economic Social and Cultural Rights.<sup>62</sup> In 2010, that Committee explicitly called for youth focused harm reduction, and connected it also to the right to benefit from scientific progress and its applications. The Committee called on Mauritius to, ‘Remove age barriers to accessing opioid substitution therapy and develop youth-friendly harm reduction services tailored to the specific needs of young people who use drugs.’<sup>63</sup>

In its General Comment on HIV/AIDS cited above, the Committee on the Rights of the Child appears to support this conclusion. In 2009, the Committee also recommended that Sweden ensure ‘the provision of necessary evidence-based support, recovery and reintegration services to all children affected by substance abuse...aimed at effectively reducing the harmful consequences of such abuse.’<sup>64</sup> Most recently, the Committee in 2011 explicitly called for ‘specialised and youth-friendly drug dependence treatment and harm reduction services for children and young people.’<sup>65</sup> It is therefore clear that while harm reduction for children and young people may be optional under the drug conventions, it is an obligation under the Convention on the Rights of the Child and the Covenant on

58 International Narcotics Control Board, *Report of the International Narcotics Control Board for 2009*, UN Doc. No. E/INCB/2009/1, para. 278.

59 See UN Drug Control Programme Legal Affairs Section, ‘Flexibility of Treaty Provisions as Regards Harm Reduction Approaches’(30 September 2002) UN Doc. No. E/INCB/2002/W.13/SS.5 (Restricted). This advice was requested by the INCB but aspects of it ignored. See paras. 21–28 on safe injection rooms.

60 Human Rights Council, ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, Mission to Sweden’ (28 February 2007) UN Doc. No. A/HRC/4/28/Add.2, para. 60.; Human Rights Council, ‘Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover’ (6 August 2010) UN Doc. No. A/65/255, paras. 50–61.

61 Human Rights Council, ‘The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS)’ (22 October 2009) UN Doc. No. A/HRC/RES/12/27, para. 5.

62 Committee on Economic, Social and Cultural Rights, ‘Concluding Observations: Tajikistan’ (4 November 2006) UN Doc. No. E/C.12/TJK/CO/1, para. 70.; Committee on Economic, Social and Cultural Rights, ‘Concluding Observations: Ukraine’ (4 January 2008) UN Doc. No. E/C.12/UKR/CO/5, paras. 28, 51.; Committee on Economic, Social and Cultural Rights, ‘Concluding Observations: Poland’ (2 December 2009) UN Doc. No. E/C.12/POL/CO/5, para. 26.

63 Committee on Economic Social and Cultural Rights, ‘Concluding Observations: Mauritius’ (21 May 2010) UN Doc. No. E/C.12/MUS/CO/4, para. 27(c).

64 Committee on the Rights of the Child, ‘Concluding Observations: Sweden’ (12 June 2009) UN Doc. No. CRC/C/SWE/CO/4, para. 49.

65 Committee on the Rights of the Child (n 38) para. 60(a).

Economic, Social and Cultural Rights.

But the above relates primarily to problematic drug use and HIV prevention. The drug conventions require the limitation of drug use to solely medical and scientific purposes. For the most part, the response to this has been to criminalise drug use or possession for personal use. Most young people who use drugs are not problematic users, but experimental or recreational, as noted above. The majority of young people transition out of these behaviours and most without significant health harms. The International Narcotics Control Board sees no room for tolerance on this, and the Committee on the Rights of the Child has yet to address recreational drug use, such as club drug use, and the various harm reduction measures that can mitigate the risks associated with it. Taking into account articles 13 and 17 of the Convention on the Rights of the Child, children and young people at the very least have the right to appropriate, confidential information (for example via telephone help lines and e-health projects) on what drugs they may be using, and what the risks are in order to help protect them from drug related harms.

Would the Committee on the Rights of the Child encourage a more tolerant approach if this is conducive to the fulfilment of the right to health? It appears so. In its Concluding Observations on Ukraine, the Committee explicitly called for the decriminalisation of children who use or possess drugs.<sup>66</sup> But far more discussion must be had by the Committee on this topic.

*Access to essential controlled medicines* – Some drug use is beneficial. The drug conventions contain dual obligations to reduce supply and demand for illicit purposes and to ensure access to drugs for medical and scientific purposes.

The International Narcotics Control Board (INCB) operates an estimates system under the 1961 Convention whereby States parties must report on controlled drugs required for medical and scientific purposes to ensure that adequate quantities are imported.<sup>67</sup> This is vital given that the 1961 Convention covers drugs such as morphine.

It is clear, however, that the latter obligation is considerably weaker. Its strongest affirmation found in the 1961 Convention is in the preamble, and therefore not binding (although it does provide important context for the purpose and importance of the estimates system and the protection of medical uses).<sup>68</sup> The 1971 Convention merely states that access to psychotropic

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<sup>66</sup> *ibid*, para. 60(b).

<sup>67</sup> See Single Convention (n 1) arts, 12, 19.

<sup>68</sup> *ibid*, preamble. 'Recognizing that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes'

substances for medical purposes should not be unduly restricted.<sup>69</sup> This is an issue the INCB has taken up, however, reasserting this obligation.<sup>70</sup> Nonetheless, overly restrictive narcotics laws and ‘scare messages’ about these drugs are known to contribute to the lack of access to such medicines for children in need.<sup>71</sup>

Approximately 80% of the world’s population has insufficient access, or no access at all, to opiates for pain relief.<sup>72</sup> This includes millions of children in need of palliative care. A child rights-based analysis, taking into account the best interests of the child (in this case children in need of such medicines), the right to life survival and development, the right to health, and freedom from cruel, inhuman and degrading treatment would serve to strengthen this latter obligation.<sup>73</sup> Indeed, in 2011, the Committee on the Rights of the Child recognised that palliative care for children is related to articles 6 and 24 of the Convention, and recommended that Belarus ‘establish a funding mechanism for the provision of palliative care for children and support the palliative care services provided by non-governmental organizations’.<sup>74</sup> While the Committee has yet to address the issue of access to essential medicines for palliative care specifically, it would appear sensible that the Convention requires that laws and policies aimed at addressing recreational use and drug trafficking do not impede access to essential medicines for children.

Each of these areas requires further study, as do others not covered here relating to other aspects of drug control. In particular, what do article 40 of the Convention on the Rights of the Child and juvenile justice standards have to say about the penal provisions of the drug conventions relating to children who are drug dependent? Article 3 of the 1988 Convention requires the criminalisation of possession of controlled drugs for personal use subject to constitutional limitations. What does this mean for countries where the Convention on the Rights of the Child or child rights provisions based on it have been incorporated into the national constitution or those in monist systems whereby international treaties are incorporated into national law? Is the criminal law an appropriate basis for addressing drug use among children? There is room for decriminalisation in the drug conventions. The INCB has been inconsistent in its view on this, accepting it in Portugal but criticising constitutional decisions elsewhere.<sup>75</sup> This is a very important discussion given the number

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69 1971 Convention (n 3) preamble.

70 International Narcotics Control Board, *Report of the International Narcotics Control Board for 1999*, UN Doc. No. E/INCB/1999/1, 1999, chap. I.

71 For example, Human Rights Watch, *Needless pain: Government failure to provide palliative care for children in Kenya*, Human Rights Watch, New York, 2010, which includes a description of the impact of narcotics laws on access to controlled medicines for pain relief.

72 Mary Ann Overland, ‘Morphine Remains Scarce for pain Sufferers Worldwide’, *Time*, 7 June 2010.

73 Diederik Lohman, Rebecca Schleifer and Joseph Amon, ‘Access to pain treatment as a human right’ *BMC Medicine*, vol. 8:8, 20 January 2010.

74 Committee on the Rights of the Child, ‘Concluding Observations: Belarus’ (4 February 2011) UN Doc. No. CRC/C/DNK/4, para. 56.

75 Contrast the Board’s view on Portugal (International Narcotics Control Board, *Report of the International Narcotics Control Board for 2004*, UN Doc. No. E/INCB/2004/1, 2005, para. 538) with its views on Argentina, Brazil and Mexico (International Narcotics Control Board, *Report of the International Narcotics Control Board for 2009*, UN Doc. No. E/INCB/2009/1, 2010, para. 453.)

of children who come in contact with the criminal justice system due to drug use and drug related crime.<sup>76</sup>

### **Conclusion: Towards a child rights based approach**

The child's rights based approach aims to integrate human rights mandates for children with ideas about child wellbeing. In the context of drugs and drug use, a child rights approach must:

- apply human rights standards, that is, holding States parties accountable, including for adequate budgetary allocation
- respect the right to accurate and objective information
- empower children 'who are capable of forming his or her own views' and encourage participation (taking into account the evolving capacities of the child)
- ensure non-discrimination
- take the best interests of the child as a primary consideration,<sup>77</sup> meaning that 'whatever decisions are taken that affect children's lives the impact of that decision must be assessed...that the interests of others – such as parents, the community or the State – should not be an overriding concern, although they may have an influence on the final outcome of the decision'.<sup>78</sup>

Depending on their circumstances, some children have the right to special care and assistance. Adolescence in general is a period of vulnerability. Among children and young people, it is essential to also know which children are especially at risk.<sup>79</sup> Adequately disaggregated data and high quality studies are an important part of identifying these individuals and groups.

Promoting the values of the Convention on the Rights of the Child can help public health, mental health, drug dependence treatment and harm reduction professionals, as well as young people, to advocate for necessary policy changes. Based on the content of most of its Concluding Observations, however, the Committee on the Rights of the Child is not

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<sup>76</sup> See, for example, Eurasian Harm Reduction Network, *Young people and injecting drug use in selected countries of Central and Eastern Europe*, Eurasian Harm Reduction Network, Vilnius, 2009.

<sup>77</sup> See UN Committee on the Rights of the Child, 'General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child' (1 July 2003) UN Doc. No. CRC/GC/2003/4.

<sup>78</sup> Save the Children Sweden, *Child Rights Programming, How to Apply Rights-Based Approaches to Programming: A Handbook for International Save the Children Alliance Members*, Stockholm/Lima, Rädda Barnen, 2005.

<sup>79</sup> N. Z. Weinberg and M. D. Glantz, 'Child Psychopathology Risk Factors for Drug Abuse: An Overview', *Journal of Clinical Child Psychology*, vol. 28, no. 3, 1999, pp. 290–297.

sufficiently up to date with the state of the art of treatment methods,<sup>80</sup> or principles of harm reduction.<sup>81</sup> On the other side of the equation, the members of the International Narcotics Control Board, given their backgrounds,<sup>82</sup> may well be up to date on such methods, but are not experienced in human rights or child rights based approaches.

The views of the drafters of the children's rights convention and the drug conventions, meanwhile, may be persuasive, but are always over-ridden by the treaties as drafted. In the context of drug use among children and young people, this is crucial. From an epidemiological and public health perspective, what was known by those drafting the 1961, 1971 and 1988 drug conventions and those drafting the CRC during the 1980s is largely irrelevant now, apart from the degree to which that knowledge may help us to understand the what the drafters wanted to achieve with these legal instruments. These are contemporary instruments of international law requiring application to drug use among today's children and young people. In order for this to happen, however, much work is required to clarify the obligations of State parties. Aside from the need for academic attention, we offer three recommendations.

First, it is now certainly time for a General Comment from the Committee on the Rights of the Child on article 33 in order to clarify state obligations under the Convention in the light of 21<sup>st</sup> century circumstances. But the knowledge and expertise of the Committee in this field would first have to be developed. A broadly collaborative day of general discussion preceding the adoption of such a comment, and, in the interim, increased, accurate information from civil society during periodic reporting would assist.

Second, a supplementary commentary on the drug conventions read in the light of the Convention on the Rights of the Child could be drafted under the auspices of the International Narcotics Control Board, the Committee on the Rights of the Child, the UN Office on Drugs and Crime, UNICEF, UNESCO, UNAIDS, the Office of the High Commissioner for Human Rights, the World Health Organization and the International Labor Organization. This close collaboration is required given the varying mandates of these agencies, the breadth of issues involved (extending beyond drug use to the involvement of children in production and trafficking), the lack of expertise in international law within

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80 See, for example, Y. Kaminer, et al., 'Psychotherapies for Adolescent Substance Abusers – Treatment Outcome', *Journal of Nervous and Mental Disease*, no. 186, 1998, pp. 684–690.; H. A. Liddle, 'Multidimensional Family Therapy for Adolescent Substance Abuse: Results of a Randomized Clinical Trial', *American Journal of Drug and Alcohol Abuse*, vol. 27, 2001, pp. 651–689.; H. Sumnall et al., *Fieldwork Report – Community Based Interventions for the Reduction of Substance Misuse Among Vulnerable and Disadvantaged Young People*, London, Liverpool, National Collaborating Center Drug Prevention and Liverpool JMU, Centre for Public Health, 2006.

81 We refer here to the Committee as a whole. Individual members may (and some do) have this experience, which should more and more be reflected in Concluding Observations. See for example D. Puras, 'UN Committee on the Rights of the Child on quality and direction of investments in child and youth health development', presentation delivered at the 20<sup>th</sup> International Harm Reduction Conference, Bangkok, April 2009. [http://www.ihra.net/files/2010/05/02/Presentation\\_21st\\_P2\\_Puras.pdf](http://www.ihra.net/files/2010/05/02/Presentation_21st_P2_Puras.pdf) (accessed 20 November 2010).

82 For the Members' CVs, see [http://www.incb.org/incb/en/membership\\_actual.html](http://www.incb.org/incb/en/membership_actual.html) (accessed 20 November 2010).

the INCB and recent questions arising about the quality of legal advice emanating from the Office on Drugs and Crime.<sup>83</sup> The experiences of civil society organisations are of course vital in making any such normative guidance relevant and applicable to the realities on the ground. It should go without saying that children and young people themselves must have a place at the table if the guidance is to be truly rights based.

Third, an interagency group at the UN could be formed around children and drugs. A model for this might be the Interagency Panel on Juvenile Justice, formerly known as the Inter-Agency Coordination Panel on Juvenile Justice, which was established by ECOSOC to act as a 'coordination panel on technical advice and assistance in juvenile justice.'<sup>84</sup> The work of the Panel is guided by the Convention on the Rights of the Child, by international standards and norms on juvenile justice and by other relevant instruments. The objective of this Panel is to facilitate and enhance country and global level coordination on technical advice and assistance in juvenile justice. While it is not even in discussion as yet, such a panel on children and drugs could contribute greatly to our understanding of child rights based approaches to this complex issue of global concern.

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83 'New drug law under fire', *Phnom Penh Post*, 21 December 2010.

84 Economic and Social Council of the United Nations, 'Administration of Juvenile Justice' (21 July 1997) res. 1997/30.



COMMENTARY

## **The Function and Relevance of the Commission in Narcotic Drugs in the pursuit of Humane Drug Policy (or the ramblings of a bewildered diplomat)**

*Alison Crocket\**

### **Introduction**

I should say first and foremost that the opinions below are my own and do not necessarily represent the views held by my government.

There are a small but significant number of people who know and understand the fine details of the international drug conventions. I am not one of them, and this is not a comment in any way on their implementation. What follows instead is a personal account. Observations, opinions and, I dare say, not a few assumptions accumulated over seven years of close hand involvement with the UN Commission on Narcotic Drugs (CND) and other multilateral fora as a state representative charged with pursuing my government's objectives in these settings in matters of drugs and crime.

It is sometimes difficult to see what connections exist between the lives and circumstances of the majority of people in the world and international drug policy and human rights in the UN, and between the sometimes bizarre debates and subsequent decisions that take weeks or months to negotiate at the Commission. It is easy to become sceptical, or even cynical, about the relevance of these decisions and their impact on the world. There are indeed a number of systemic problems that make any true critical analysis difficult, and change extremely slow. However, I also believe that inflated expectations or misguided beliefs about what the CND can hope to achieve can lead to disappointment by analysts and experts on the issues.

It is my sincere belief that the work of the CND has the potential to be a force for good in the

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world of drug policy and, in a modest yet important way, help the many people in the world who are so grievously wounded by laws and practices that surround drug cultivation and use. This is why it is worth the considerable effort that so many people invest in it. In order to make the most of its influence, however, it is important to recognise what the Commission can and cannot do, and to focus attention on the possible rather than the impossibly aspirational (whilst bearing that in mind at all times).

## **What the Commission on Narcotic Drugs cannot do and why**

### *1. Make Policy Decisions Based on Substance*

There are fundamental differences between those who analyse and shape international drug policy in academic environments, and those who guide ‘policy’ in the CND boardroom. The first and most obvious is that when government representatives attend the Commission to discuss ‘drug control’, they are there to discuss how to counter transnational organised crime. The focus is on how to stop drugs being used, grown, transited or supplied, rather than viewing the problem through the prism of public health or understanding it as a part of societal functioning.

What is more, the objective of all governments in multilateral fora is to defend and promote their own national interests. As such, the notion of ‘common good’ to some extent takes a back seat.

The CND, while ostensibly a technical commission,<sup>1</sup> is not a body of experts there to deliberate and decide on global best practice. Governments are often represented in negotiations by officials from their departments of foreign affairs, whose expertise on drug policy is often, at best, limited to boardroom negotiations, and who may have very little in the way of practical experience of the issue being debated. Experts on substance are also often in attendance, but their influence will vary according to a number of other factors, including:

- a) *The wide range of interests at play at any given time.* In any one year there will usually be between fifteen and twenty resolutions at the CND. Governments will have particular issues that they want to highlight, and will gladly ‘horse trade’ on others that are of less importance to them in order to gain ground in the ones they consider to a priority.
- b) *Totally unrelated influences* that can alter a government’s decision about how forcefully

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<sup>1</sup> CND is a Functional Commission of the UN Economic and Social Council.

to insist on certain language and/or concepts. These influences can include the current political environment (nationally and internationally), commercial interests, regional, ideological or political alliances or long term positions that replicate themselves in every international governing body.

Little wonder then that policy specialists and activists are frustrated and confused by what seems like counter-productive and contradictory decisions taken at CND, and decisions that seem to have little basis in fact despite the existence of a great deal of information and evidence upon which to rely.

## *2. Provide Adequate Direction to the UN Office on Drugs and Crime, or Guide Member States' Activities*

All decisions that are taken at the Commission are the product of prolonged negotiation, and are taken by consensus. Therefore, they are by definition the lowest common denominator outcome of any discussion, and any one country can skew any decision significantly.

The obvious solution to this might seem to some to force the CND to vote on certain issues, which is certainly possible under the rules of procedure.<sup>2</sup> This would be a mixed blessing in my view. Certainly it would prevent a small minority of countries from blocking what seems to be consensus. But the reality is that on issues such as harm reduction and human rights it is entirely probable that those pushing these issues would lose the vote. This is not necessarily because a majority of countries oppose the actual concerns or propositions raised, but rather because block voting is common, for instance the G77,<sup>3</sup> and a minority with strong views against may push the entire block in that direction. Forcing a vote would also require a Member State to break the so-called 'Spirit of Vienna', a myth in the UN which highlights the spirit of consensus in that UN venue. Doing so would create a great deal of bad feeling. It would also in all probability cause other Member States to vote in opposition to the Member State(s) proposing the vote, not just on that occasion but for some time to come. Everyone knows that Member States have long memories, which is why, despite coming very close on a number of occasions, the Commission has never voted on a resolution.

In addition, many countries use the opportunity of the CND to make strong statements on

<sup>2</sup> 'Rules of Procedure of the Functional Commissions of the Economic and Social Council', rule 58.1, [http://www2.ohchr.org/english/bodies/hrcouncil/docs/ECOSOC.rules\\_En.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/ECOSOC.rules_En.pdf) (accessed 10 January 2011).

<sup>3</sup> The 'Group of 77' consists of seventy-seven developing nations and was formed to promote the collective economic interests and strengthen the negotiating capacity of these UN Member States.

national priorities, filling hours of meeting time with facts and statistics carefully drafted to show how well that country is doing on the topic under consideration. Critical analysis of whether policies are working or not is rarely conducted unilaterally in public international settings.

As a consequence of the above, decisions and resolutions are by necessity ambiguous, vague and 'build on past success' rather than taking into account past failures or shortcomings. This leaves the UN Office on Drugs and Crime, the UN's programmatic agency on these issues, to make up its own mind about priorities and policy. These decisions are frequently at the mercy of funding availability, given that 93% of the activities of the Office are funded through voluntary contributions from States, most of it tightly earmarked. But that is a whole different article.

### **The problem with human rights**

Although human rights is an issue that many agree is central to drug policy, as well as every other issue that pertains to UN functioning, it is a matter with which the distinguished delegates of the Commission rarely trouble themselves.

According to many countries, the only venue where it is appropriate to debate human rights within the UN is in the Human Rights Council in Geneva. There are many reasons why a government may take this view. Some may say that human rights should be integrated into everything, and therefore do not need to be highlighted in drug control resolutions. Others may say that the expertise to discuss specific instances of potential human rights violations, themes or concerns is not present in this Commission, and therefore it is not appropriate to discuss human rights within the CND.

In any event, there are risks associated with the introduction of human rights language in any resolution. These risks have to be weighed against the advantages of securing even a nominal commitment to protecting rights for drug users and others who are affected by the cultivation, use or sale of illicit substances.

One small piece of wisdom learned from negotiating resolutions through the last eight CNDs is that things can always get worse. As soon as an issue is raised or revisited, the risk exists that the outcome will be language that is weaker and less direct than that which already exists in other UN decisions. Since there is a convention that most recent text is the current 'agreed language', losing ground in the Commission on Narcotic Drugs could

potentially damage hard won language gained in previous CNDs or in other UN fora. An example of this was a draft resolution on human rights in 2008, which contained a call for the abolition of the death penalty for drug offences. Rather than risk weakened language from the historic General Assembly moratorium resolution adopted not long before,<sup>4</sup> many Member States, though abolitionist and with strong positions against the death penalty, allowed the paragraph to be deleted based on objections from various CND Member States and the prospect of inevitably watered down language if the provision were to be debated.

On balance, I believe that it is useful to raise the issue intermittently, to ensure it stays on the agenda, and to remind Member States and the relevant international drug control organs that human rights are relevant and necessary for all people, in particular vulnerable groups in our society such as drug users and prisoners. The above mentioned human rights resolution in 2008 was, for example, finally adopted.<sup>5</sup> This was a first for the Commission, and had the effect of compelling the Office on Drugs and Crime to consider human rights in the context of its operational activity, which may in future have an impact on the way the organisation does its business. As a result of this resolution, in 2010 the Office presented a conference room paper on human rights to both the CND and its other governing body, the Commission on Crime Prevention and Criminal Justice, that looked critically at its capacity gaps and the need for greater human rights scrutiny of its projects.<sup>6</sup>

## Two little words

If there is one thing that characterises the division between those countries that support a pragmatic, humane approach to working with drug users and those that would rather ‘make examples out of them’, it is the long and vociferous debate over two words - ‘harm reduction’. In plain English, the term could not be more innocuous. How could one possibly be against reducing the harm caused by drugs? Yet this term has yet to appear a single CND resolution, despite its inclusion in resolutions of other international political fora, including the General Assembly.<sup>7</sup> Those who oppose it would say that in allowing a more tolerant and pragmatic view of drug use to become part of our thinking, the term represents ‘legalisation by the back door’. This is absolutely in opposition to the ‘war on drugs’ ideology that has

4 UN General Assembly, ‘Moratorium on the use of the death penalty’ (26 February 2008) UN Doc. No. A/RES/62/149.

5 The resolution was finally adopted as CND resolution 51/12 ‘Strengthening cooperation between the UNODC and other United Nations entities for the promotion of human rights in the implementation of the drug control treaties’, Report of the 51<sup>st</sup> Session of the UN Commission on Narcotic Drugs (March 2008) UN Doc. No. E/2008/28- E/CN.7/2008/15, p. 32.

6 UN Office on Drugs and Crime, ‘Drug control, crime prevention and criminal justice: A Human Rights perspective: Note by the Executive Director’ (3 March 2010) UN Doc. No. E/CN.7/2010/CRP.6-E/CN.15/2010/CRP.1.

7 See, for example, UN General Assembly, ‘Political Declaration on HIV/AIDS’ (2 June 2006) UN Doc. No. A/RES/60/262, para. 22. ‘Reaffirm that the prevention of HIV infection must be the mainstay of national, regional and international responses to the pandemic, and therefore commit ourselves to intensifying efforts to ensure that a wide range of prevention programmes that take account of local circumstances, ethics and cultural values is available in all countries, particularly the most affected countries, including (...) expanded access to essential commodities, including male and female condoms and sterile injecting equipment; harm-reduction efforts related to drug use; (...)’

dominated global thinking on this issue for so long.

To see progress, one must consider the many euphemisms that have been used to express the concepts behind harm reduction. Descriptions of demand reduction services have moved from ‘Education, treatment, care, rehabilitation and social reintegration’<sup>8</sup> to ‘Early intervention, rehabilitation and social reintegration’<sup>9</sup> to finally ‘Comprehensive prevention programmes and treatment, care and related support services’.<sup>10</sup> The significance is that, finally, there is acknowledgement that drug users can be supported whilst still actively using narcotics, and not necessarily be pushed towards abstinence programmes in the first instance. In addition, the practices of needle and syringe programmes and opiate substitution therapies such as methadone are now endorsed unequivocally by the UN system.<sup>11</sup> This endorsement is limited to the context of HIV prevention, but nonetheless it is something that was unthinkable five years ago.

### Why bother? It’s only words

So, given the strength of the opposition, the glacial rate of progress, the incoherent and at times nonsensical resolutions and the lack of knowledge and understanding displayed by some representatives of Member States on the evidence and facts around drug policy, is it still worth the huge effort to get and stay involved?

My view is that it is absolutely worthwhile.

The CND is important simply for the process that one goes through in order to take decisions. As many have said before me, if the UN did not exist, it would have to be invented. Drug policy, as we know, is influenced in the national and international environments by culture, history, dogma, ideology, prejudice and perceived public opinion, all of which take a very long time to shift. Evidence, to a greater or lesser extent, takes a back seat. The CND is an opportunity to listen to other views, and to try to understand these positions and what drives them. It is also still possible to share thinking on what works and what does not, even if some countries are sceptical.

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8 Commission on Narcotic Drugs, ‘Prevention of HIV among drug users’ (March 2004) Report of the 47<sup>th</sup> Commission on Narcotic Drugs, UN Doc. No. E/2004/28 - E/CN.7/2004/13, res.47/2, p. 22.

9 Commission on Narcotic Drugs, ‘Strengthening international cooperation in drug demand reduction’ (March 2005) Report of the 48<sup>th</sup> Session of the UN Commission on Narcotic Drugs, UN Doc. No. E/2005/28–E/CN.7/2005/11, res. 48/10, p. 26.

10 Commission on Narcotic Drugs, ‘Political Declaration and Plan of Action on International Cooperation towards an Integrated and Balanced Strategy to Counter the World Drug Problem’ (March 2009) Report of the 52<sup>nd</sup> Session of the UN Commission on Narcotic Drugs, UN Doc. No.E/2009/28-E/CN.7/2009/12, p. 37.

11 UN Office on Drugs and Crime, World Health Organization & UNAIDS, *Technical guide for countries to set targets for universal access to HIV prevention, treatment and care for injecting drug users*, 2009. For further UN technical papers and resolutions see also International Harm Reduction Association & Human Rights Watch, *Building Consensus: A Reference Guide to Human Rights and Drug Policy*, March 2009.

For this reason, it is important to continue to table resolutions that we know may lead to difficult and contentious discussions, as doing so gives us an opportunity to present the evidence, debate the facts and allow the many other countries who may not be speaking, but are certainly listening to the debate, to make up their own minds. This is important, particularly for countries which may not have sophisticated and well established legal systems or laws in this area, as they will look to the UN for guidance.

In the seven years I have been attending CND meetings, civil society organisations have heightened their presence and increased their influence exponentially. Seven years ago, their representation was patchy at best. Their interests were diverse and their impact minimal. Since that time, however, this has changed. For example, powerful side events have been held by non-governmental organisations during CND sessions, some highlighting the plight of individuals who have been victims of the drug war, others clearly demonstrating human rights abuses and others again giving sound policy advice based on best available evidence.

Given the fact that most of the countries attending such events are already convinced of the arguments, it is easy to assume that we are preaching to the converted. However, every year a handful of sceptics attend, and every year some are persuaded. In recent years, my experience has been that civil society has found a voice because it is better co-ordinated, more focused and works more effectively than ever before with 'friendly' governments to pursue common objectives.

Given that appalling practices continue to take place in the name of drug policy, it is easy to become disheartened about international processes. Our inability to introduce the words 'harm reduction', the backlash against any clear human rights agenda and the emphasis on crime, for example, can create scepticism or apathy about the CND. But without continuous pressure and participation, things could indeed be worse. Part of the work of those campaigning for humane and pragmatic drug policy is not just to advocate for progress, but also to prevent recession, a task which requires considerable energy.

Although progress is difficult to determine at a single CND session, if viewed over a number of years it is clear that things have changed for the better and certain norms have been established. A few words in a resolution, a compelling paper circulated at an opportune moment, a useful contact made between officials or between a civil society expert and a sceptical government official do make a real difference to people's lives in the end. We need patience, persistence, understanding and tolerance, even in the face of utter intransigence and prejudice, to continue to shape the face of international drug policy,

virtues that many people that I have had the honour to work with in the past seven years, representing governments and civil society alike, hold in abundance, and which has made my work here in Vienna an absolute pleasure.

CASE SUMMARY

## Canadian Court of Appeal upholds supervised injection site's right to operate

*PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15 (B.C. Court of Appeal)

Sandra Ka Hon Chu\*

On 15 January 2010, the British Columbia Court of Appeal, the province's highest appellate court, held that Insite, North America's first supervised injection facility, was a provincial undertaking that did not undermine the federal goals of protecting health or eliminating the market that drives drug-related offences. As such, the Court held that the drug possession and trafficking provisions of the *Controlled Drugs and Substances Act* (CDSA) did not apply to Insite.<sup>1</sup>

Insite was opened in September 2003 by the Vancouver Coastal Health Authority in partnership with PHS Community Services Society. The facility, in which people are able to inject illicit drugs under the supervision of health workers, opened as a response to epidemic levels of infectious diseases and drug overdoses among people who inject drugs in Vancouver's Downtown Eastside.

Recognising the limitations of abstinence-based approaches in dealing with a street-entrenched open drug scene, Insite was designed as part of a larger strategy to minimise the negative consequences of drug use for communities and individuals by facilitating contact with high-risk injecting drug users, providing means to reduce their risk of injecting drug use-related health complications and death and assisting them to access other health and social services.<sup>2</sup> Insite operated under the purview of federal exemptions from prosecution for possession and trafficking

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<sup>1</sup> *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15 (B.C. Court of Appeal).

<sup>2</sup> *PHS Community Services Society v. Attorney General of Canada*, 2008 BCSC 661 (B.C. Supreme Court).

of a controlled substance contrary to Sections 4(1) and 5(1) of the *CDSA*, based on necessity for a scientific purpose.

The exemption was originally granted by the federal Liberal Party Minister of Health in 2003, and was subsequently extended to June 2008. When no further extensions appeared to be forthcoming under a new Conservative government, two separate actions were commenced before B.C.'s superior trial court (the province's Supreme Court), one by PHS Community Services Society and two of its clients, and the other by the Vancouver Area Network of Drug Users (VANDU), a drug user activist organisation.

In its action, PHS claimed that Insite was a health care undertaking, authority for the operation of which lay with the province. As a consequence, federal constitutional power to legislate with respect to criminal law could not interfere with the provincial constitutional power with respect to health care because of the doctrine of inter-jurisdictional immunity.

The B.C. Supreme Court rejected this argument, but accepted PHS's alternative claim, which was that Sections 4(1) and 5(1) of the *CDSA* were unconstitutional and should be struck down because they deprive persons addicted to one or more controlled substances of access to health care at Insite. This, the Court found, violated the right conferred by Section 7 of the *Canadian Charter of Rights and Freedoms* to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.<sup>3</sup>

Consequently, the B.C. Supreme Court declared those sections of the *CDSA* inconsistent with the *Charter of Rights and Freedoms* and of no force and effect, and granted Insite an ongoing constitutional exemption permitting its continued operation without fear of criminal prosecution of its service users or its staff. The Court granted the federal government a one-year suspension of the effect of the declaration of constitutional invalidity to allow it time to rewrite its laws to allow for the medical use of illegal drugs, if they are part of a health care program.

The Attorney General of Canada appealed this order, and PHS cross-appealed the dismissal of its application for a declaration that Sections 4(1) and 5(1) of the *CDSA* did not apply to Insite because of the doctrine of inter-jurisdictional immunity.

In its decision, the B.C. Court of Appeal held that the effect of the application of the doctrine

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<sup>3</sup> *ibid.*

of inter-jurisdictional immunity was to limit the federal enforcement power sufficiently to protect the exercise of an exclusive provincial power — namely, the provision of a health care service.

As held by Justice Huddart, writing for the majority,

Insite is a provincial undertaking. It is a health care facility created under and regulated by provincial legislation within the province’s exclusive power....It would be difficult to envisage anything more at the core of a hospital’s purpose, than the determination of the nature of the services it provides to the community it serves. Indeed, it would be difficult to envisage anything more at the core of the province’s general jurisdiction over health care than decisions about the nature of the services it will provide.”<sup>4</sup> [emphasis in original]

In Justice Huddart’s view, a supervised drug injection service did not undermine the federal goals of protecting health or eliminating the market that drove the more serious drug-related offences of import, production and trafficking. Rather, ‘[t]o the extent that the criminal law treats possession for personal use as an offence because of its role in creating an illegal “supply and demand” market, that role has already run its course when an addict enters Insite or a comparable facility.’<sup>5</sup>

Justice Huddart said that the restricted application of inter-jurisdictional immunity to protect a provincial undertaking where two *intra vires* exercises of authority collide precluded a pre-emptive, automatic and non-contextual determination in favour of federal power. Accordingly, the B.C. Court of Appeal dismissed Canada’s appeal and allowed the cross-appeal of PHS, holding that Sections 4(1) and 5(1) of the *CDSA* were inapplicable to Insite. Given its findings in this regard, Justice Huddart decided that consideration of PHS’s alternative claim under Section 7 of the *Charter* was unnecessary.

Nevertheless, Justice Rowles held, in *obiter*, that she agreed with the lower court ruling that Sections 4(1) and 5(1) of the *CDSA* engaged the rights to life, liberty and security of the person with respect to users of Insite and that those provisions violated Section 7 of the *Charter* in a manner that was not in accordance with the principles of fundamental justice. In her view, ‘[t]he effect of the application of the *CDSA* provisions to Insite would deny persons with a very serious and chronic illness access to necessary health care and would come without

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<sup>4</sup> *PHS Community Services Society v. Canada* (n 2) para. 157.

<sup>5</sup> *ibid.*, para. 169.

any ameliorating benefit to those persons or to society at large.<sup>6</sup> Moreover, in her decision, Justice Huddart said that she had had the opportunity to review the reasons of Justice Rowles, and that she was in ‘general agreement with them’.<sup>7</sup> As such, a majority of the B.C. Court of Appeal agreed with the *Charter* arguments advanced by PHS in support of Insite.

In February 2010, federal Justice Minister Rob Nicholson announced Canada’s intention to appeal the ruling to the Supreme Court of Canada, the country’s final court of appeal.<sup>8</sup>

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6 *ibid*, para. 76.

7 *ibid*, para. 199.

8 Canadian Broadcasting Corporation, ‘Ottawa to appeal injection site ruling’, *CBC News*, 9 Feb 2010.

## Contents

Volume I, 2010

### Editorial

'Deliver us from evil?' – The Single  
Convention on Narcotic Drugs, 50 years on  
**Rick Lines**

### Original Articles

Targeted Killing of Drug Lords: Traffickers as  
Members of Armed Opposition Groups  
and/or Direct Participants in Hostilities  
**Patrick Gallahue**

*Yong Vui Kong v. Public Prosecutor* and the  
Mandatory Death Penalty for Drug Offences  
in Singapore: A Dead End for Constitutional  
Challenge?  
**Yvonne McDermott**

### Interview

Litigating against the Death Penalty for Drug  
Offences: An interview with Saul Lehrfreund  
& Parvais Jabbar

### Commentaries

Children who use Drugs: The Need for More  
Clarity on State Obligations in International  
Law  
**Damon Barrett & Philip E Veerman**

The Function and Relevance of the  
Commission in Narcotic Drugs in the pursuit  
of Humane Drug Policy (or the ramblings of a  
bewildered diplomat)  
**Alison Crocket**

### Case Summary

Canadian Court of Appeal Upholds  
Supervised Injection Site's Right to Operate  
**Sandra Ka Hon Chu**